Petition

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in the

Supreme Court

of the

United States

October Term, 1981

BANK OF MIAMI, POPULAR BANCSHARES CORPORATION
Petitioners,

v.

ANA LAING MEASON, EDITH DAVIS, ERROL S. SCHUTTE, GLORIA SCHUTTE, POPULAR BANK AND TRUST COMPANY, LTD., FRANCISCO A. NAVARRO, ANDRES F. RODRIGUEZ, HAYDEE RODRIGUEZ
Respondents.

AND

BANK OF MIAMI, f/k/a NORTHSIDE BANK
Petitioner,

v.

ANA LAING MEASON, POPULAR BANK AND TRUST COMPANY, LTD., FRANCISCO A. NAVARRO, ANDRES F. RODRIGUEZ, HAYDEE RODRIGUEZ,
Respondents.

PETITION OF BANK OF MIAMI AND POPULAR BANCSHARES CORPORATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

1. Is a non-equity, fixed interest bearing certificate of deposit, issued by an international banking institution, a security within the purview of the Federal Securities Laws?

2. Can a federal court properly determine that a bank issued certificate of deposit is not a "security" in the context of a Motion to Dismiss under Fed.R.Civ.P. 12(b)(1)?

PARTIES

Ana Laing Meason — Plaintiff

Edith Davis — Plaintiff

Errol S. Schutte — Plaintiff

Gloria Schutte — Plaintiff

Bank of Miami — Defendant

Popular Bancshares Corporation — Defendant

Popular Bank and Trust Company, Ltd. — Defendant

Francisco A. Navarro — Defendant

Andres F. Rodriguez — Defendant

Haydee Rodriguez — Defendant

Edgardo Bernal — Trustee of Ana Laing Meason Trust

Angela Bernal De Delgado — Co-Trustee

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Petitioners submit this Petition for Writ of Certiorari, pursuant to Rule 19.4 of the United States Supreme Court Rules, for two cases decided by the United States Court of Appeals for the Fifth Circuit. These cases involve similar facts, and each raises the legal questions for which review is sought herein.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit in *Meason u Bank of Miami* ("Meason I") (*See*, Appendix A, p. A-1, *infra*) was dated August 6, 1981 and entered August 6, 1981, and has not yet been reported. The Opinion of the Fifth Circuit in *Meason u Popular Bank & Trust Co., Ltd.* ("Meason II") (*See*, Appendix B, p. B-1, *infra*) was dated July 21, 1981 and entered July 22, 1981 and is unreported. The Fifth Circuit's Order Denying Appellees' Petition for Rehearing in Meason I (*See*, Appendix C, p. C-1, *infra*) was dated and entered September 28, 1981, and a similar Order was dated and entered in Meason II (*See*, Appendix D, p. D-1, *infra*) on September 9, 1981. The Opinions by the United States District Court for the Southern District of Florida in the three cases consolidated as Meason I (*See*, Appendix E, p. E-1, *infra*) and in the case involved in Meason II (*See*, Appendix F, p. F-1 *infra*) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1).

STATUTES, REGULATIONS AND CONTRACTUAL PROVISIONS INVOLVED

The pertinent Statutes and Regulations involved in this case are: Section 2(1) of the Securities Act of 1933, 15 U.S.C. §77b(1) (1976); Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(10) (1976); Securities and Exchange Commission Rule 10b-5, 17 C.F.R. §240.10b-5; International Banking Act of 1978, 12 U.S.C. §3101, *et seq.* (West 1979); The Banks And Trust Companies Regulation Law of the Grand Cayman Islands, as revised. (*See*, Appendix G, pp. G-1 through G-21, *infra*).

The certificates of deposit at issue are set forth in Appendix H, pages H-1 through H-9.

STATEMENT OF THE CASE

A. MEASON I

According to Complaints filed below, Plaintiffs went to the Bank of Miami for the purpose of depositing money into interest bearing accounts. It is further alleged that Plaintiffs met Defendant Francisco A. Navarro, an employee of Bank of Miami, who advised Plaintiffs to place their money in certificates of deposit issued by Popular Bank and Trust Company, Ltd. As alleged by all Plaintiffs, Defendant Bank of Miami was and is a State chartered bank organized and operating under the laws of the State of Florida. Defendant Popular Bank and Trust Company, Ltd., was, prior to its failure, a bank organized pursuant to the law of the Grand Cayman Islands, British West Indies. Finally, it is alleged that after the certificates matured, Plaintiffs made

presentment and demand on Popular Bank and Trust Company, Ltd., and on Bank of Miami for redemption of their certificates and that said presentment and demand was refused. Plaintiffs claim that the Defendant banks failed to disclose facts material to the subject transactions and made various misrepresentations all violative of the federal securities laws.

Attached as Exhibits to each of the Complaints involved in this case were copies of the instruments upon which suit was brought. These documents were each entitled "Term Deposit Account in U.S. Dollars" and delineated "terms and conditions" of the "deposits." The terms and conditions which were the same for all Plaintiffs were the non-transferability or assignability of the deposit and the fact that it was to be governed by the laws of the jurisdiction in which the issuing bank was located, the Grand Cayman Islands. The amount and time of each deposit, the interest rate and the method by which interest was to be paid differed as to each Plaintiff.

Plaintiffs' sole basis for federal jurisdiction was the allegation that the Defendant banks' conduct was violative of the Securities Act of 1933, the Securities Exchange Act of 1934 and Rule 10(b)-5 promulgated thereunder. Plaintiffs' complaints were not limited to Federal Securities Act counts, however, but they also asserted various state law and common law claims, including claims for violation of the Florida Sale of Securities law, claims for negligence, breach of fiduciary duty, fraud, conspiracy, conversion, and breach of contract.

On September 26, 1979, the United States District Court for the Southern District of Florida entered its

Order and Opinion dismissing each of the aforesaid Complaints for lack of subject matter jurisdiction, reasoning that the certificates "simply reflect[ed] the amount of currency deposited with a banking institution for an agreed period of time" and not an "investment" arrangement subject to the federal securities laws. Following Plaintiffs' subsequent motions and memoranda for reconsideration and clarification, the District Court issued two Orders stating that the dismissal "did not reflect any adjudication on the merits of Plaintiffs' claims", but rather that Plaintiffs' remedies would be properly sought under their state and common law causes and not under the federal securities laws.

A three judge panel of the Court of Appeals reversed the District Court's Order, holding that the certificates of deposit attached to the Complaints may constitute securities and, as such, "plaintiffs' claims that their transactions involved a 'security' were not [sufficiently] immaterial or insubstantial" to merit dismissal at the pleadings stage. Opinion, at 10021; Appendix A, p. A-11, *infra*. Finally, petitioners filed a suggestion for *en banc* rehearing which was denied by the Fifth Circuit on September 28, 1981.

B. MEASON II

As in Meason I, the Plaintiff in Meason II went to the Bank of Miami* to deposit money and was allegedly advised by an employee of the Bank to place her money in non-transferable, fixed interest bearing certificates

*Subsequent to the date of the acts complained of in Meason II, Northside Bank, formerly a party defendant in that case, was merged into the Bank of Miami.

of deposit issued by Popular Bank and Trust Company, Ltd.

The Complaint in Meason II is nearly identical to those at issue in Meason I. Plaintiff asserted various state and common law claims along with causes under the federal securities laws, upon which Plaintiff bases her claim to federal subject matter jurisdiction.

On June 15, 1979, the United States District Court entered its Order dismissing the Complaint at issue in Meason II for lack of subject matter jurisdiction on the basis that a "Certificate of Deposit is not a security within the meaning of . . . [the Federal Securities Acts]." Plaintiff subsequently sought leave to amend her Complaint, which was denied by Court Orders dated July 27 and August 23, 1979.

On July 21, 1981, a three judge panel of the Court of Appeals reversed the District Court's July 27 and August 23, 1979 Orders, referring to their ruling in Meason I that "in certain situations a certificate of deposit may be a security," and holding that Plaintiff should have been granted leave of court to amend her Complaint. Petitioners filed a suggestion for *en banc* rehearing in Meason II, on the basis that the panel's decision necessarily relied on the finding that a certificate of deposit may be a security. The Fifth Circuit denied this suggestion on September 9, 1981.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The instant case presents the question of whether federal securities regulation should be extended over the deposit taking activities of this country's international banking institutions. The Fifth Circuit Court of Appeals has found such an extension to be warranted. The Fifth Circuit's decision in this case is in direct conflict with the ruling by the Seventh Circuit, to the contrary, in *Canadian Imperial Bank of Commerce Trust Company v. Fingland*, 615 F.2d 465 (7th Cir. 1980), that the federal securities laws were inapplicable to certificates of deposit issued by a Bahamian bank.

The conflict between the Fifth and Seventh Circuits is of major importance to this country's financial institutions. The American banking system does not operate in a vacuum isolated from banks in other parts of the world. At the present time, there is a large and rapidly growing international banking community in this country, including U.S. chartered banks with foreign branches; international banking corporations ("Edge Act" banks); foreign-chartered banks transacting business in the United States pursuant to the International Banking Act of 1978 (12 U.S.C. §3101, *et seq.*); and United States-based banks accepting deposits, on a correspondent basis, for transfer into the accounts of foreign regulated banking institutions. Questions as to the proper scope of regulation for this country's banking industry are no less significant in the context of international than of domestic banking activities.

This Court has already indicated the importance which it attaches to the question of whether a certificate of deposit is a security by granting certiorari to review a ruling by the Third Circuit Court of Appeals that a certificate issued by a domestic bank may be subject to the federal securities laws. *Marine Bank v. Weaver*, 49 U.S.L.W. 3893 (Case No. 80-1562, June 1, 1981). Petitioners respectfully submit that this Court cannot fully address the important issue before it in *Marine Bank* without also having before it the record in this case.

As *Marine Bank* arises in the domestic banking context, refusal by this Court to review the instant case along with *Marine Bank* would leave unresolved the conflict between the Fifth and Seventh Circuits as to whether securities regulation may be applicable in the international banking context.[1] Legal determinations as to the proper scope of federal securities regulation do not turn on whether the bank transaction at issue occurred in an international as opposed to a domestic context. Yet were this Court to decide *Marine Bank*, whose facts are limited to the domestic context, without granting certiorari to review the Fifth Circuit's ruling in this case, the securities laws' applicability to international banking transactions would remain in doubt.

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[1]We note, here, the position taken by the Securities and Exchange Commission in an amicus brief submitted to this Court in the *Marine Bank* case. While the Securities and Exchange Commission requests that this Court reverse the Third Circuit Court of Appeals' holding that the domestic bank issued certificates of deposit at issue in *Marine Bank* constituted securities, it at the same time expressly argues that foreign-bank issued certificates are not necessarily exempt from federal securities regulation.

I.

CONFLICT WITH STATUTORY AND JUDICIAL AUTHORITY

A. Bank Issued Certificates of Deposit Are Not Covered By The Plain Language of the Federal Securities Acts

The statutory definition of the term "security" does not encompass commercial bank-issued certificates of deposit and cannot be construed to support the ruling by the Fifth Circuit in this case. Such an application is clearly inconsistent with the omission of passbooks and certificates of deposit from the detailed list of instruments deemed by Congress to be "securities" in the definitions sections of the Securities Exchange Act of 1934 (Section 3(a)(10)) and of the Securities Act of 1933 (Section 2(1)).

That Congress has always considered the business of receiving deposits a banking function, substantially different from the selling of securities is underscored by the fact that Congress simultaneously enacted two separate regulatory schemes to correct abuses in the securities and banking industries. Indeed, Congressional passage of the Banking Act of 1933 (commonly known as the "Glass-Steagall Act") at the same time as it was undertaking a comprehensive investigation of the securities industries which culminated in the proposal and enactment of the 1933 and 1934 Securities Acts, is overwhelming evidence of Congressional intent to regulate the deposit taking business of banks through the banking statutes, rather than through the federal securities laws. And the recent enactment of the International

Banking Act of 1978, 12 U.S.C. §3101, *et seq.*, is further indicative of a continued Congressional intent to govern the banking industry in this country, both domestic and international, by the federal banking laws, rather than the federal securities system of regulation.

B. The Fifth Circuit's Decision Misapplies This Court's "Economic Realities" Test And Conflicts With Decisions By Other Courts Applying That Test To Bank Deposit Taking Activity

In reaching its holding in the instant case, the Fifth Circuit Court of Appeals finds that the "economic realities" test adopted by this Court for determining the existence of a security: (a) may compel application of the federal securities laws to bank deposit taking activities, and (b) cannot be applied properly at the pleadings stage of a lawsuit to cause dismissal of a federal securities claim in the context of a bank deposit transaction. The former finding conflicts with prior judicial determinations as to the "realities" of bank deposit taking activity, whether in the context of a domestic or international banking transaction. Moreover, the latter finding, which is not at issue in the *Marine Bank* case currently before this Court, places the instant case squarely in conflict with the Seventh Circuit's opinion in *Canadian Imperial Bank* and further warrants a grant of certiorari herein.

While this Court has never squarely addressed the issue of whether non-equity, bank issued certificates of deposit may be subject to federal securities regulation, it has, in several recent decisions, refused to expand the coverage of the federal securities laws where the Plaintiffs

advanced abstract arguments which were inconsistent with the "economic realities" of the subject transactions. *See, International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979); *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975). If the transaction is of the type reasonably intended to generate profits or losses based on the "managerial efforts" of the holder, securities regulation will apply; otherwise, where commercial earnings, such as interest, are sought, the transaction cannot be held to be a security. *Daniel, supra*, 439 U.S. at 562.

The economic realities of bank deposit taking is that depositors are entitled to earn interest, not profits. This is so for foreign as well as domestic chartered banks. The bank which issued the certificates of deposit at issue here, Popular Bank and Trust Company, Ltd., was in the business of borrowing and lending money. As appears on the face of Plaintiffs' complaints, the interest to be paid on the money deposited at Popular Bank and Trust Company, Ltd. by Plaintiffs was fixed and did not depend on the profitability of that Bank. Rather, the Bank promised to pay the Plaintiffs a fixed amount of interest.[2] Regardless of the profits, or losses, realized by Popular Bank and Trust Company, Ltd.

[2]That Plaintiffs did not expect speculative profits is underscored by the fact that the rate of return of the certificates issued by the Cayman Bank were hardly higher than the rates paid by major United States banks during the relevant period. The rate of interest to be received by Plaintiffs ranged from only 6% to 7⅛%, depending on the date and amount of their certificates. The rate of return paid by major United States banks on deposits of $100,000 or more of one year duration, as quoted in the Wall Street Journal on September 1, 1977 (the date of Plaintiff Davis' deposits), was 6.65%.

from its use of the Plaintiffs' deposits, that Bank was obligated by contract to pay the stated interest. The transaction at issue in this case was purely and simply a commercial, contractual obligation, and not an investment.[3]

The Fifth Circuit's application of the economic realities test in the instant case is directly in conflict with various decisions of other Federal Courts of Appeals that have applied this Court's "economic realities" test to conclude that bank-issued certificates of deposit are not securities. *Canadian Imperial Bank of Commerce Trust Company v. Fingland, supra; Burrus, Cootes and Burrus v. MacKethen*, 537 F.2d 1262 (4th Cir. 1976), *withdrawn as moot*, 545 F.2d 1388, 1391 (4th Cir. 1976), *cert. denied*, 434 U.S. 826 (1977); *Bellah v. First National*

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[3]This Court's holding in *Tcherepnin v. Knight*, 389 U.S. 332 (1967) strongly supports the conclusion that deposit taking activity of a bank is not subject to the securities laws, whether or not the particular bank at issue is subject to federal banking regulation. Indeed, while the Savings and Loan Association involved in *Tcherepnin* was not subject to federal banking regulation, this Court did not predicate its holding that the certificates issued by that savings institution were securities on such a basis. Rather, this Court relied on the following "investment" oriented aspects of the certificates at issue in *Tcherepnin*, none of which are presented by the certificates at issue herein, in finding the securities laws applicable: (1) each holders' return was not on the basis of a contract to pay a fixed rate of interest but a share of the profits; (2) each holder became a member of the Association entitled to vote on its affairs; and (3) the instruments were assignable and transferable. 389 U.S. at 338-40.

Bank of Hereford, Texas, 495 F.2d 1109, 1114-16 (5th Cir. 1974).[4]

In *Canadian Imperial Bank* the United States Court of Appeals for the Seventh Circuit was presented with facts and claims strikingly similar to those at issue here in holding that certificates of deposit issued by a foreign bank, there a Bahamian bank, were not securities. The district court dismissed the plaintiff's complaint for want of subject matter jurisdiction on the basis that the bank's deposit receiving transactions were commercial in nature, notwithstanding that the plaintiff there, as here, alleged that the bank: (1) knew it would not return any of the deposited funds because it was insolvent; (2) used the funds in "highly speculative transactions for which bank loans would never be properly forthcoming"; (3) carried no international bank guarantees or insurance on its deposits; and (4) made fraudulent representations to the plaintiff and permitted the bank assets to be fraudulently diverted. The Seventh Circuit, affirming the lower court, opined that such allegations "[s]imply describe[d] a victim whose currency was being held in a commercial transaction and not a victim-investor aspiring for profits." 615 F.2d at 470.

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[4]In addition to the aforementioned decisions by Federal Courts of Appeal, a number of Federal District Courts have ruled that bank deposits are not securities because depositors do not speculate for profits nor rely on the skills of bank officers when they make deposits or withdraw deposited funds with interest. *See, Ayala v. Jamaican Savings Bank*, [1981] Fed.Sec.L.Rep. (CCH) ¶98,041 (E.D.N.Y. June 15, 1981); *Hamblett v. Board of Savings and Loan Associations*, 472 F.Supp 158 (N.D. Miss, 1979); *Hendrickson v. Buchbinder*, 465 F.Supp 1250 (S.D. Fla. 1979); *deSaavedra v. Bank of Miami*, No. 79-1771 (S.D. Fla. June 29, 1979); *Romero v. Bank of Miami*, No. 79-2552 (S.D. Fla., June 28, 1979).

The Fifth Circuit necessarily found that a certificate of deposit may be a security by holding that the district court's dismissal was inappropriate at the pleadings stage. The Fifth Circuit opined that the inquiry into the economic realities of a commercial banking transaction, necessary to the determination of the existence of a security, could not be made at the pleading stage of the litigation. However, when the complaints which were dismissed by the district court are stripped of their repetitive rhetoric and legal conclusions, they merely cite a familiar sequence of events—a depositor enters a bank and opens a term deposit account. The Fifth Circuit's narrow construction of subject matter jurisdiction dismissal standards not only avoids the important issue requiring determination in this case, but also conflicts with decisions by this Court which clearly indicate that "economic realities" is a legal determination fully applicable to a Rule 12(b)(1) analysis of subject matter jurisdiction. *See, International Brotherhood of Teamsters v. Daniel, supra; United Housing Foundation, Inc. v. Forman, supra.* Clearly, it is for the Court and not for the jury to determine whether a bank's deposit taking activity can be subject to the federal securities laws and whether claims directed thereto can give rise to federal subject matter jurisdiction.

Petitioners submit that the Fifth Circuit's narrow interpretation of Rule 12(b)(1) standards within the context of an economic realities analysis provides another compelling basis for review by this Court of the Fifth Circuit's decision in the instant case. Unlike *Marine Bank*, the securities issues in *Canadian Imperial Bank* and the instant case were determined in the context of a motion to dismiss. Were this Court to decide *Marine Bank* without the benefit of having before it the record

in the instant case, then, a conflict in the Circuits would remain as to the discretion of a district court judge to dismiss, on the pleadings, federal securities allegations against bank defendants.

C. The Fifth Circuit's Extension Of The Federal Securities Laws To The Banking Transactions At Issue In This Case Cannot Be Upheld On The Basis That The Issuer Bank Was Chartered Under Foreign Rather Than Federal Banking Law

Any suggestion that the Fifth Circuit's holding can be supported by the absence of federal banking regulation over the Defendant, Popular Bank and Trust Company, Ltd., is simply untenable. It confounds logic to suggest that an essentially commercial instrument can be a security when issued by a foreign bank, and not be a security when issued by a domestic banking institution. And even if the degree of banking regulation applicable to an issuer bank is a relevant concern, extension of the federal securities laws to cover the deposit transactions at issue in the instant case is not warranted.

First, it must be noted that Congress had applied the federal banking laws to cover the field of international banking prior to the date that plaintiffs deposited their money in the Defendant bank. Federal regulation has long been in place to cover the deposit taking activities of foreign branches of U.S. chartered banks, 12 U.S.C. §601, *et seq.*, as well as of U.S. based Edge Act banking corporations, 12 U.S.C. §611, *et seq.* And in 1978, less than one year after issuance of the certificates at bar, Congress enacted the International Banking Act, *supra*,

and made applicable to U.S. based, foreign-chartered banks, such as the Cayman bank defendant herein, the same set of comprehensive federal banking regulations as previously applicable to domestic and other international bank deposit taking activities.

Clearly, the essential commercial nature of the certificates of deposit at issue in this case cannot be altered, and a holding that these certificates are "securities" cannot be supported on the mere basis that their issuance predated by a year the enactment of the International Banking Act of 1978. Such a conclusion is compelling in view of the fact that Congress had addressed the subject of international banking long prior to 1978 and had determined to defer from foreign chartered banks application of the federal banking laws, in favor of regulation by state and foreign banking authorities. And it would effectively undermine this Congressional determination to apply the disclosure oriented requirements of the federal securities laws to the pre-1978 deposit taking activities of such banks.[5]

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[5]Congress' recent enactment of the International Banking Act to cover foreign banking activities such as those at issue in this case does not diminish the need for this Court to determine whether the Federal Securities Laws may be properly applied to the deposit taking activities of banks, such as the Cayman Bank, which are regulated by foreign rather than U.S. banking law. We note that Congress has not yet seen fit to extend Federal banking regulation over the deposit taking activities of foreign regulated banks for whom United States based banking institutions have accepted deposits on a correspondent basis. *See*, 12 U.S.C. §§348a and 358; 12 C.F.R. §§214.01, *et seq.* Yet this determination by Congress, and the agencies authorized by Congress to regulate the banking industry in this country, should not subject such correspondent deposit transactions to the disclosure requirements

Secondly, the deposit taking activity of the Cayman Bank was subject to a scheme of banking regulation similarly comprehensive and pervasive as that provided under the federal banking laws. The Banks and Trust Companies Regulation Law of the Grand Cayman Islands, and regulations promulgated thereunder contain extensive provisions for the licensing and regulation of banking in the Cayman Islands. (*See*, Appendix G, pp. G-10 through G-28, *infra*). Moreover, the Cayman Bank's deposit taking activity was subject to banking regulation pursuant to applicable State law. *See*, Fla. Stat. §§663.01, *et seq.* (1981).[6]

The Congress has clearly indicated its preference, in view of the importance of international banking activities to this country's financial institutions, that equal treatment be accorded to foreign-chartered banks operating in the United States as to domestic banks.[7] And this Court has cautioned against extension of federal securities regulation, acknowledging the social costs associated with regulatory duplication, not only where an industry is already subject to other *federal* regulatory

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(Footnote 5 Continued)

of the securities laws. And the acceptance by the federally regulated domestic bank Defendants herein of Plaintiffs' deposits, for transfer to the Cayman Bank, is closely analogous to an international correspondent deposit transaction.

[6]Indeed, Plaintiffs herein have alleged that the deposit taking activities of the Cayman Bank were subject to, and violative of, State banking regulation pursuant to Florida banking law.

[7]International Banking Act of 1978, House Report No. 95-910, 95th Congress, 2nd Session, February 28, 1978, p. 5; Senate Report No. 95-1073, 95th Congress, 2nd Session, August 8, 1978, p. 2.

schemes, *see, International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979), but also where comprehensive regulation by non-federal governing authorities has already been applied. *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977).

Finally, application of the federal securities laws is not necessary to protect depositors in foreign-chartered banks doing business in the United States. In this case, for example, the domestic banking institutions joined as parties Defendant (Petitioners herein) were clearly subject to pervasive federal and and state banking regulations at the time of the issuance of the certificates at bar. Moreover, the various state law and common law remedies set forth in Plaintiffs' complaints may be pursued by Plaintiffs in state court without the need for Federal Securities Act jurisdiction.

II.

IMPACT ON THE BANKING INDUSTRY

The enormous impact of the Fifth Circuit's ruling upon the deposit receiving institutions in this country, both national and international, further warrants review of the case at bar by this Court. Banks and other deposit taking institutions have long been protected by federal, state, international and foreign regulations which have insured a degree of confidentiality of operations essential to maintain their financial intregrity. Indeed, application of the antifraud provisions of the Securities Laws, with their emphasis on disclosures, could well undermine the well established practices

long followed in the financial community and impose unwarranted costs on banks and their customers.

For example, it is not unlikely that banking institutions will be forced to respond to securities regulation by preparing and delivering documents which parallel prospectuses delivered by non-exempt issuers. The impact of the constant changes in a bank's loans portfolio, the amount of issued letters of credit, the rate of interest paid for overnight funds, the reserve requirements established by the Federal Reserve Board and other factors which control a bank's profitability would mandate rapid revisions making security-type disclosures to depositors engaging in deposit and withdrawal transactions extremely costly.

The uncertainty engendered by the Circuit Courts of Appeals' conflicting securities treatment of bank deposit taking activities warrants resolution in the international banking context no less than in the domestic area. As of June, 1981, over $300,000,000,000 was on deposit in foreign branches of United States chartered banks, international banking ("Edge Act") corporations and foreign banking institutions doing business in the United States.[8] And while precise data is not available, it is estimated than an even larger sum was deposited into correspondent accounts of U.S. based banks for transfer into the accounts of foreign banks. As discussed above, failure by this Court to review the Fifth Circuit's opinion in the instant case at the same time as it decides the issues presented in *Marine Bank* may leave

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[8]Consolidated Report of Condition, FDIC Form CC8022-18, June, 1981.

unresolved the present uncertainty as to the applicability of the federal securities laws to these institutions.

Moreover, the potential impact of the Fifth Circuit's determination that the "economic realities" of bank deposit taking activities cannot be determined at the pleadings stage further warrants review by this Court of the instant case. Clearly, if bank officers cannot rely upon a Court's application of a clear standard (suitable for use at the dismissal stage of a lawsuit) which exempts them from the anti-fraud disclosure requirements of the federal securities laws (in favor of being governed by Federal and state banking laws and regulations, banking laws and regulations of foreign countries and the laws and regulations provided by the International Banking Act of 1978), prospective-type documents will still be unnecessarily generated. Banking institutions by their very nature are unlikely to respond otherwise to a decision that bank deposits are not strictly exempt from federal securities regulation with the attendant risk that a finder of fact may find their particular transactions to constitute securities.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinions, cited herein, of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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ENTRY OF APPEARANCE

COMES NOW, ALAN T. DIMOND, ESQ. and MARLENE K. SILVERMAN, Attorney at Law, who hereby enter their appearance in this Court as counsel for Petitioners, Bank of Miami and Popular Bancshares Corporation.*

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*The following are affiliate corporations of Petitioner, Bank of Miami: Popular Bank of Florida; Popular Mortgage Company

Petitioner, Popular Bancshares Corporation has no affiliates or subsidiaries other than wholly owned subsidiaries.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed, postage prepaid, pursuant to Supreme Court Rules 28.3 and 28.4, to JAMES C. BLECKE, ESQ., Blackwell, Walker, Gray, Powers, Flick & Hoehl; MALCOLM H. FROMBERG, ESQ., Fromberg, Fromberg, Roth, Gross, Cohen & Shore, P.A.; TODD S. ROGEL, ESQ., Fromberg, Fromberg, Roth, Gross, Cohen & Shore, P.A.; MICHAEL A. ROSEN, Weintraub, P.A.; VICTOR HUGO RAMS, ESQ.; DAVID A. SIRIGNANO, Securities and Exchange Commission; ARTHUR BEAMON, ESQ., Federal Deposit Insurance Corporation; HONORABLE REX E. LEE, Solicitor General, Department of Justice; BRUCE CULPEPPER, ESQ., Culpepper, Beatty & Turner and to SCOTT R. McNARY, ESQ., George, Hart & McNary, on this 19th day of October, 1981.

ALAN T. DIMOND

Appendix

Ana Liang MEASON,
Plaintiff-Appellant,

v.

BANK OF MIAMI, a State Bank and Florida Corp., et al.,
Defendants-Appellees.

Edith DAVIS,
Plaintiff-Appellant,

v.

BANK OF MIAMI, et al.,
Defendants-Appellees.

Errol S. SCHUTTE and Gloria Schutte,
Plaintiffs-Appellants,

v.

BANK OF MIAMI, et al.,
Defendants-Appellees.

No. 79-3607.

United States Court of Appeals,
Fifth Circuit.
Unit B

Aug. 6, 1981.

Plaintiffs appealed from an order of the United States District Court for the Southern District of Florida,

Norman C. Roettger, Jr., J., dismissing their complaints, which alleged violations of the antifraud and registration provisions of the federal securities laws in the sale of certificates of deposit issued by an offshore bank, for lack of subject-matter jurisdiction. The Court of Appeals, Vance, Circuit Judge, held that plaintiffs' claims that certificates of deposit were securities were not so immaterial or insubstantial as to allow dismissal of their complaints for lack of subject-matter jurisdiction.

Reversed and remanded.

1. Federal Courts —32

Subject-matter jurisdiction is not defeated by the possibility that the averments of the complaint might fail to state a cause of action on which petitioners could actually recover. Fed. Rules Civ. Proc. Rule 12(b)(1), 28 U.S.C.A.

2. Federal Civil Procedure —1742.1

Plaintiffs' claims that certificates of deposit issued by an offshore bank were securities were not so immaterial or insubstantial as to allow dismissal of their complaints, which alleged violations of the antifraud and registration provisions of the federal securities laws in the sale of such certificates, for lack of subject-matter jurisdiction. Securities Act of 1933, §§12(1, 2), 22(b), 15 U.S.C.A. §§77l(1, 2), 77v(b); Securities Exchange Act of 1934, §§10(b), 27, 15 U.S.C.A. §§78j(b), 78aa.

Appeals from the United States District Court for the Southern District of Florida.

Before VANCE, HATCHETT and ANDERSON, Circuit Judges.

VANCE, Circuit Judge:

Plaintiffs appeal from a district court order dismissing their complaints for lack of subject matter jurisdiction. In three separate actions, later consolidated by the lower court, plaintiffs asserted violations of the antifraud and registration provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 in the sale of certificates of deposit issued by an offshore bank of the Grand Cayman Islands. The district court dismissed their suits, ruling that the certificates of deposit are not securities within the meaning of the federal securities laws. Because we conclude that the plaintiffs' claims could not properly be dismissed for lack of subject matter jurisdiction, we reverse and remand.

Proceedings in the District Court

Errol S. Schutte and Gloria Schutte filed the first of the three consolidated cases involved in this appeal on January 16, 1979. As amended the thirteen count complaint asserted violations of Sections 12(1) and (2) of the Securities Act of 1933, 15 U.S.C. §77l(1) and (2); section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) and rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5; and state law and common law claims. Federal jurisdiction was predicated on section

22(b) of the Securities Act of 1933, 15 U.S.C. §77v;[1] and section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa;[2] and diversity jurisdiction.[3] Named as defendants in the Schuttes' complaint were Bank of Miami, Popular Bancshares Corporation (Bancshares), Northside Bank of Miami, Popular Bank and Trust Co., Ltd. (Popular), Francisco A. Navarro, and Andres F. Rodriguez. Defendants Bank of Miami and Bancshares moved to dismiss the complaint for lack of federal

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[1]15 U.S.C. §77v(a) provides in pertinent part:

> The district courts of the United States, and the United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.

[2]U.S.C. §78aa provides in pertinent part:

> The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder.

[3]The district court's ruling that there was no diversity jurisdiction has not been appealed. The lower court found that the Schuttes were citizens of the Netherlands Antilles, and that because a foreign corporation and an alien were defendants that the case was essentially a suit between aliens, and could not be "considered by this court under diversity of jurisdiction" (citing 13 C. Wright and A. Miller, Federal Practice and Procedure §3604 (1975)).

jurisdiction and for failure to state a claim upon which relief could be granted.

The complaints in both the Davis and Meason cases were premised upon facts and claims very similar to those contained in the Schuttes' complaint. The court *sua sponte* consolidated the three cases. After oral argument the district court dismissed the Schuttes' amended complaints and the original complaints of Meason and Davis on September 26, 1979. On October 19, 1979 the court denied the plaintiffs' motions for reconsideration but granted the motion for clarification by stating that the order of dismissal was with prejudice and that no leave to file an amended complaint was granted.[4]

Factual Allegations

In granting the motions to dismiss, the district court had before it only plaintiffs' complaints. For purposes of a motion to dismiss the allegations of the complaint must be accepted as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S.Ct. 1843, 1848, 23 L.Ed.2d 404 (1969). Because the complaints are lengthy and complex a review of the allegations in some detail is appropriate.

Schuttes' amended complaint avers that on April 1, 1977, both Popular and Bank of Miami were wholly owned subsidiaries of defendant Bancshares, a Florida chartered bank holding company. Defendant Bank of

[4]The district court also issued an order explaining that the dismissal "did not reflect any adjudication on the merits of the plaintiffs' claims" and that the dismissal "reflected the court's opinion that plaintiffs had not and could not, if leave to amend were granted, invoke this court's subject matter jurisdiction."

Miami is a Florida state bank. Popular, however, is a bank organized pursuant to the law of the Grand Cayman Islands, British West Indies. Popular had no offices of its own and was not licensed to do business in the United States. Instead, it conducted its business through the officers and employees of the Bank of Miami.

On or about April 1, 1977, Errol S. Schutte went to Bank of Miami to transfer certain funds from a checking account into an interest bearing account. There, Schutte met Navarro who was introduced as being in charge of the International Banking Division for Bank of Miami and for Bancshares. Navarro advised Schutte to place his money in a certificate of deposit issued by the defendant Popular since "according to Navarro, Popular was the best investment 'they' had to offer." Navarro also represented to Schutte that "there was no risk and that his money would be perfectly safe since Popular was owned by the same company which owned Bank of Miami, to-wit: Bancshares." Schutte bought a $250,000 Popular certificate in his and his wife's names. On August 18, 1977 an additional transfer of $50,000 was authorized by the Schuttes to buy a second certificate.[5]

The Schuttes allege that on February 16, 1978 Bancshares sold Popular to defendant Rodriguez and

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[5]Although the plaintiffs refer to these instruments as certificates of deposit in their complaint, the record reflects that they were labelled "Term Deposit Account in U.S. Dollars" on the face of the instrument. As the Supreme Court stated in *Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 553, 19 L.Ed.2d 564 (1967), in attempting to determine whether an instrument is a security, "form should be disregarded for substance."

others.[6] The Schuttes were advised of this transaction by letter dated March 7, 1978. According to their complaint, on May 31, 1978 Schutte attempted to contact defendant Navarro for the purpose of redeeming his certificates of deposit. He was told at the Bank of Miami that Navarro could be contacted at the Northside Bank, which had also been purchased by defendant Rodriguez. When Schutte finally reached Navarro at Northside, Navarro informed him that Popular was now owned by Northside and that although Popular was no longer owned by Bancshares, it was still owned by a United States bank and was continuing business as usual. On the basis of these representations Schutte agreed to roll over his certificates of deposit. He tendered his old certificates and received new certificates for all the sums he had previously placed with Popular through Bank of Miami and Bancshares. Subsequently, on June 5, 1978 Schutte presented a cashier's check for $132,415.06 to Navarro at Northside requesting that Navarro deposit $130,000 in an interest bearing account in his behalf and pay over to him the remaining balance. Schutte never received a certificate of deposit for this transaction.

On June 30, 1978 Errol Schutte went to Northside to redeem his certificates. He was informed by Navarro that Popular did not have sufficient funds within the United States but that there were more than sufficient funds in the Grand Cayman Islands and that he would contact Schutte when the funds had been transferred. Schutte did not wait for the transfer. He flew to the

[6]Plaintiffs allege that the sale of Popular to the Rodriguez group was a "bootstrap" acquisition in view of the fact that most of the consideration paid to Bancshares was obtained by converting the assets of Popular.

Grand Cayman Islands but was unable to locate any office or establishment known as the Popular Bank and Trust Co., Ltd. He discovered that Popular was conducting business through a subsidiary of a Canadian company. The Canadian agent informed Schutte that Popular did not have sufficient funds to redeem any of his certificates of deposit, not even one for $2,576.59.

The factual allegations upon which plaintiffs Davis and Meason base federal jurisdiction are similar to those pled by the Schuttes. The Meason complaint alleges that Angela Bernal, the mother of Ana Laing Meason, purchased certificates of deposit issued by the Bank of Miami prior to 1974. In October 1976, Bernal was introduced to Navarro who advised her to purchase from Bank of Miami a certificate of deposit issued by Popular. She was advised, according to allegations in her complaint "that her money was just as safe in Popular as if deposited in Bank of Miami . . . that the purchase of said certificate of deposit was a safe investment in that Popular was solvent and able to meet its obligations . . . that the plaintiff's money would be handled by Bank of Miami, Bancshares and Popular in good faith and in a reasonably prudent manner in order to protect her investment."[7]

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[7]Meason's complaint, as well as those of Davis and Schutte, alleges that she was not advised of the following material facts:

(a) that Popular was not licensed or allowed to do business legally in the United States or the State of Florida;

(b) that Popular was not under the control or supervision of the United States, any of its agencies, the State of Florida, or any of its agencies;

The Meason complaint further alleges that on October 11, 1976 Angela Bernal purchased two certificates of deposit from the Bank of Miami and Bancshares issued by Popular in the amounts of $127,000 and $144,700 with a maturity date of October 6, 1977. Meason did not receive the original certificates of deposit but was "induced" to leave the original certificates with Navarro at the Bank of Miami, which gave her a receipt for them. Without the permission of Angela Bernal or Meason the proceeds of these certificates of deposit were used on December 5, 1977 to purchase two more certificates of deposit in the same amount which had a new maturity date of December 5, 1978.

Edith Davis avers that in September of 1977 she purchased a $500,000 Pouplar certificate of deposit from Navarro who advised her that it was a safe investment, that the Bank of Miami and Bancshares would vouch for the security of the investment and that their assets stood behind Popular. Davis further alleges that she was induced to leave the original certificate in safekeeping

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(Footnote 7 Continued)

(c) that Popular was not insured by the Federal Deposit Insurance Corporation or by any other such entity;

(d) that Popular was an entity totally separate from Bank of Miami or Bancshares which could be sold to anyone at any time without notice to or permission of plaintiff.

(e) that Popular was making investments contrary to state and federal banking laws, rules and regulations and contrary to generally acceptable banking practices in the United States and the State of Florida.

at Bank of Miami by Navarro who receipted the same for Popular.

The plaintiffs' certificates were not paid by defendants notwithstanding presentment and demand.

Standard for Dismissal

In dismissing the complaints the district court stated that "the dispositive issue in this case is clearly whether the 'certificates of deposit' involved in the various transactions are securities within the federal securities laws." Initially, the court noted that the proper analysis of the issue required an "examination of the economic realities of the transactions involved." Relying on a test formulated in *Securities and Exchange Commission v. W. J. Howey Co.*, 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946) for determining whether a transaction is an investment contract under the securities laws, the district court concluded that the certificates of deposit were not securities and dismissed for lack of subject matter jurisdiction.

[1] The district court's dismissal cannot be reconciled with the standard established in *Bell v. Hood*, 327 U.S. 678, 682-83, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946) that a complaint should not be dismissed for lack of subject matter jurisdiction unless the federal claim is "immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous." *Id.* at 682-83, 66 S.Ct. at 776. As stated by the Court in *Bell*,

> Jurisdiction, therefore, is not defeated . . . by the possibility that the averments might

> fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Id. at 682, 66 S.Ct. at 776. *Accord, Duke Power Co. v. Carolina Environmental Study Group, Inc.* 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978). *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). *See also* 13 C. Wright & A. Miller, Federal Practice and Procedure §3564 at 428 (1975) ("The test for dismissal is a rigorous one and if there is any foundation of plausibility to the claim federal jurisdiction exists.").

This circuit has held that a question of whether certain transactions are securities within the meaning of the federal securities laws should not be determined on a motion to dismiss for lack of subject matter jurisdiction unless the complaint fails to meet the standards of *Bell v. Hood. See Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981); *Bell v. Health-Mor, Inc.*, 549 F.2d 342, 344 (5th Cir. 1977); *Hilgeman v. National*

Insurance Co. of America, 547 F.2d 298, 300 (5th Cir. 1977). In our extensive discussion in *Williamson v. Tucker* we cited our decision in *Bell v. Health-Mor, Inc.* for the proposition that "the *Bell v. Hood* standard is met only where the plaintiff's claim 'has no plausible foundation' or 'is clearly foreclosed by a prior Supreme Court decision.'" *Williamson*, 645 F.2d at 416 (quoting *Bell v. Health-Mor, Inc.*, 549 F.2d at 344) (footnote omitted). We went on to state that "the definition of the term 'security' in the context of a suit based on the federal securities laws may reach the merits of the case and thereby limit the court's discretion to dismiss for lack of subject matter jurisdiction." *Id.* (citing *Hilgeman* and *Health-Mor*). In such a case, providing that the standards of *Bell v. Hood* are met, the proper course "is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case." *Williamson*, 645 F.2d at 415.

[2] For the reasons set forth below, we believe that plaintiff's assertion that the certificates of deposit are securities is not so immaterial or insubstantial as to allow dismissal for lack of jurisdiction. This is not a case where the claim lacks plausible foundation or is clearly foreclosed by a prior Supreme Court decision. Although we do not decide whether plaintiffs purchased a security it is clear that plaintiffs' allegations are sufficient to preclude determination of this issue on a motion brought under Fed.R.Civ.P. 12(b)(1).

The Commercial-Investment Dichotomy

As noted, the district court in dismissing this action relied heavily on the Supreme Court's definition of an investment contract under the securities laws:

> [A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party . . . .

SEC v. W. J. Howey Co., 328 U.S. 293, 298-99, 66 S.Ct. 1100, 1102-1103, 90 L.Ed. 1244 (1946). Applying the *Howey* test the district court held that "[a]lthough these certificates are clearly investments in that plaintiffs deposited currency with defendants in return for the certificate with the expectation of earning a certain rate of interest, they clearly were not procured with the reasonable expectation of profits solely from the efforts of others." The court explained that "[t]he certificates simply reflect the amount of currency deposited with a banking institution for an agreed upon period of time."

Plaintiffs argue that as a matter of law the certificates of deposit issued by Popular are securities or at the very least that a question of fact exists as to whether the certificates were purchased for any investment purpose. Plaintiffs contend the applicable test is whether the purchase was made as an investment or whether it was of a commercial nature. Their argument focuses on the district court's acknowledgement that the instruments were investments. They argue that the promise to pay a fixed return makes these instruments similar to an investment promissory note, a bond, a debenture or some other speculative investment with a fixed return.

The Securities and Exchange Commission entered the case as *amicus curiae* because of its belief that the

district court construed the definition of a security too narrowly.[8] The SEC expresses concern that the lower court's ruling that the purchasers could not expect profits because of the fixed return might affect other securities with a fixed return.[9] In this and in other federal courts[10] the SEC advances its opinion that in various circumstances involving certificates of deposit and similar bank instruments securities are involved. The Commission contends that the instruments sold by the defendants are securities and that the true economic reality is that solicitation of investors' funds was not significantly different from any corporate enterprise seeking debt financing. It opines that an investment contract is only one of the many kinds of securities and that the district court's reliance on the *Howey* test is therefore misplaced. While recognizing the exemption of certain securities issued by banks from the registration requirements under section 3(a)(2) of the Securities Act, 15 U.S.C. §77c(a)(2), the Commission claims that the exemption does not apply to this case because the

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[8]We note that other *amicus* briefs have been filed as well including that of the Federal Deposit Insurance Corporation.

[9]Other courts have not been restricted by a concept of a fixed return in deciding whether a transaction was covered by the definition of a "security." *See, e.g., El Khadem v. Equity Securities Corp.*, 494 F.2d 1224, 1229 (9th Cir.), *cert. denied*, 419 U.S. 900, 95 S.Ct. 183, 42 L.Ed.2d 146 (1974); *SEC v. Nat'l Executive Planners, Ltd.*, 503 F.Supp. 1066 (M.D.N.C. 1980); *SEC v. G. Weeks Securities, Inc.*, 483 F.Supp. 1239, 1243-44 (S.D. Tenn. 1980).

[10]*See, e.g., Adato v. Kagan*, 599 F.2d 1111 (2d Cir. 1979); *Burrus, Cootes & Burrus v. MacKethan*, 537 F.2d 1262 (4th Cir.) *opinion vacated*, 545 F.2d 1388 (1976), *cert. denied*, 434 U.S. 826, 98 S.Ct. 103, 54 L.Ed.2d 85 (1977); *Safeway Portland Employees' Federal Credit Union v. C. H. Wagner & Co.*, 501 F.2d 1120 (9th Cir. 1974).

certificates were issued by a foreign bank. It points out in addition that although bank securities are exempt from registration they are not exempt from the antifraud prohibitions of section 10(b).[11] We note that as the agency established by Congress to administer the securities laws the Commission's interpretation of the Acts is entitled to considerable weight. *E. I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55, 97 S.Ct. 2229, 2234, 53 L.Ed.2d 100 (1977); *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694, 719, 95 S.Ct. 2427, 2442, 45 L.Ed.2d 486 (1975). *See also Saxbe v. Bustos*, 419 U.S. 65, 74, 95 S.Ct. 272, 278, 42 L.Ed.2d 231 (1974).[12]

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[11] *See Weaver v. Marine Bank*, 637 F.2d 157, 164 (3d Cir. 1980); 2 A. Bromberg & L. Lowenfels, Securities Fraud & Commodities Fraud §6.5 (1979).

[12] The Supreme Court in *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20, 99 S.Ct. 790, 800 n.20, 58 L.Ed.2d 808 (1979) explained:

> This deference is a product both of an awareness of the practical expertise which an agency normally develops, and of a willingness to accord some measure of flexibility to such an agency as it encounters new and unforeseen problems over time. But this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history. On a number of occasions in recent years this Court has found it necessary to reject the SEC's interpretation of various provisions of the Securities Acts. See *SEC v. Sloan*, 436 U.S. 103, 117-119, 98 S.Ct. 1702, 1711, 56 L.Ed.2d 148 (1978); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 n.27 [97 S.Ct. 926, 949 n.27, 51 L.Ed.2d 124] (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-14 [96 S.Ct. 1375, 1390-1391, 47 L.Ed.2d 668] (1976); *Forman*, 421 U.S. at 858 n.25 [95 S.Ct. at 2063 n.25] . . . .

We agree that the district court placed excessive reliance upon the test articulated in *Howey*. This court has avoided applying a single rigid test in determining the existence of a security. Instead, we have repeatedly stressed that a court must examine the economic realities of the transaction in question to decide whether it is appropriately characterized as commercial or investment in nature.

This approach is rooted in the language and history of the securities laws and the decisions of the Supreme Court. In drafting the Securities Act of 1933,[13] Congress sought to define "the term 'security' in sufficiently

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[13]Section 2(1) of the Securities Act of 1933, 15 U.S.C. §77b(1) defines a "security" as

> any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

The definition of a "security" in section 3(a)(1) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(10) is "virtually identical," *Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 553, 19 L.Ed.2d 564 (1967), the latter Act omitting "evidence of indebtedness." *Accord, McClure v. First National Bank of Lubbock, Texas*, 497 F.2d 490, 493 n.1 (5th Cir. 1974), *cert denied*, 420 U.S. 930, 95 S.Ct. 1132, 43 L.Ed.2d 402 (1975). *See also* S.Rep.No.792, 73d Cong. 2d Sess., 14 (1934).

broad and general terms so as to include within that definition the many types of instruments that in our commercial world fall within the ordinary concept of a security." H.R. Rep.No.85, 73d Cong., 1st Sess., 11 (1933). *See United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 847, 95 S.Ct. 2051, 2058, 44 L.Ed.2d 621 (1975); *Tcherepnin v. Knight*, 389 U.S. 332, 339, 88 S.Ct. 548, 554, 19 L.Ed.2d 564 (1967). As explained by the Supreme Court in *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 351, 64 S.Ct. 120, 123, 88 L.Ed. 88 (1943): "In the Securities Act the term 'security' was defined to include by name or description many documents . . . [T]he reach of the Act does not stop with the obvious and commonplace." Accordingly, the Court has concluded that the Exchange Act and the Securities Act should be construed broadly to effectuate the statutory policy affording extensive protection to the investing public. *See Tcherepnin*, 389 U.S. at 336, 88 S.Ct. at 553. *See also* S.Rep. No.47, 73d Cong. 1st Sess. 1 (1933) (indicating legislative intent of the Securities Act to protect the public from the sale of fraudulent and speculative schemes).[14]

The Supreme Court has consistently taken a functional approach in distinguishing "securities" from

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[14]The remedial purposes of the Act were expressed as follows:

> The aim is to prevent further exploitation of the public by the sale of unsound, fraudulent, and worthless securities through misrepresentation; to place adequate and true information before the investor; to protect honest enterprise, seeking capital by honest presentation, against the competition afforded by dishonest securities offered to the public through crooked promotion . . . .

"non-securities."[15] In *Howey* the Court note that state courts had construed the term investment contract broadly with an eye to economic realities and in *Tcherepnin* it similarly emphasized that "in searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality." 389 U.S. at 336, 88 S.Ct. at 553 (citing *Howey*). An examination of economic realities dominated the analysis of the Court in *Forman* and in *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 99 S.Ct. 790, 58 L.Ed.2d 808 (1979) where the Court emphasized that the *Howey* test was to be applied in light of the "economic realities of the transaction." *Id.* at 558, 99 S.Ct. at 795.

Although the Supreme Court has observed that the *Howey* test "in shorthand form, embodies the essential attributes that run through all of the Court's decisions defining a security," *Forman*, 421 U.S. at 852, 95 S.Ct. at 2060, it has never suggested that the test is to be invoked ritualistically whenever the existence of a security is at issue. Instead, the Court has applied the *Howey* test when considerations pertinent to an investment contract applied to the instrument in question. Thus in *Tcherepnin* the Court applied the *Howey* test only after deciding that "[o]f the several types of instruments designated as securities by §3(a)(10) of the 1934 Act,

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[15]For a discussion of some of the problems that have developed in defining a security *see* Deacon and Prendergast, *Defining a "Security" After the* Forman *Decision*, 11 Pacific L.J. 213 (1980); Newton, *What is a security? A Critical Analysis*, 48 Miss.L.J. 167 (1977); Comment, *International Brotherhood of Teamsters v. Daniel: Security or Insecurity?* 48 UMKC L.Rev. 108 (1979).

the petitioners' shares most closely resemble investment contracts." 389 U.S. at 338, 88 S.Ct. at 554. In *Forman* the Court applied the *Howey* test after stating that "[w]e perceive no distinction, for present purposes, between an 'investment contract' and an 'instrument commonly known as a "security." ' " 421 U.S. at 852, 95 S.Ct. at 2060. As this circuit has noted, "the *Howey* test is not possessed of . . . talismanic quality" even in defining an investment contract, *SEC v. Koskot Interplanetary, Inc.*, 497 F.2d 473, 481 (5th Cir. 1974) and we have observed that the Supreme Court in *SEC v. United Benefit Life Insurance Co.*, 387 U.S. 202, 87 S.Ct. 1557, 18 L.Ed.2d 673 (1967) has found the existence of an investment contract under the securities laws without citing *Howey*. *Id.*

We have recognized that the Supreme Court has rejected a literal application of the definitional sections of the Securities Acts. *United American Bank of Nashville v. Gunter*, 620 F.2d 1108, 1114 (5th Cir. 1980). In similarly rejecting this approach we have stated "that a note's status as a security depends on whether it can be characterized as commercial or investment in nature." *Id.* at 1115. We adopted this "commercial-investment dichotomy" in *Bellah v. First National Bank*, 495 F.2d 1109 (5th Cir. 1974) and have reaffirmed this mode of analysis in several subsequent cases involving notes. *See, e. g., Gunter; National Bank of Commerce v. All American Assurance Co.*, 583 F.2d 1295 (5th Cir. 1978); *SEC v. Continental Commodities Corp.*, 497 F.2d 516 (5th Cir. 1974); *McClure v. First National Bank of Lubbock, Texas*, 497 F.2d 490 (5th Cir. 1974), *cert. denied*, 420

U.S. 930, 95 S.Ct. 1132, 43 L.Ed.2d 402 (1975).[18] *See also* Annot. 39 A.L.R.Fed. 357 (1978).

The *Bellah* court applied the commercial-investment dichotomy not only to notes but to certificates of deposit as well. Although the court found the investment characteristic lacking in the certificate of deposit at issue, it modified the dismissal of the suit to permit the plaintiffs to pursue the theory that the certificate of deposit was a security. 495 F.2d at 1114-16. *See also Reid v. Hughes*, 578 F.2d 634, 638 (5th Cir. 1978) (recognizing that "in certain situations a certificate of deposit can be a security as that term is used in the Act. . . . "). In formulating the commercial-investment dichotomy, the court in *Bellah* perceived that it was articulating the same concerns underlying the test stated in *Howey* which the court cited for its emphasis on the "investment nature of an enterprise." 495 F.2d at 1115 n.8. *Cf. Gunter*, 620 F.2d at 1114-15 (indicating the interrelated character

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[18] *See generally* Sonnenschein, *Federal Securities Law Coverage of Note Transactions: The Antifraud Provisions*, 35 Bus.Law. 1567, 1588 (1980); Comment, *Bank Loan Participations as Securities: Notes, Investment Contracts, and the Commercial/Investment Dichotomy*, 15 Duquesne L.Rev. 261 (1977); Comment, *Notes as Securities Under the Securities Act of 1933 and the Securities Exchange Act of 1934*, 36 Md.L. Rev. 233 (1976); Comment, *When is a Note a Security?* 18 Santa Clara L.Rev. 757 (1978).

of the *Howey* test and the commercial-investment dichotomy approach).[17]

Applying the preceding discussion of the law to the case at bar, it is apparent that by dismissing this suit for lack of subject matter jurisdiction, the district court foreclosed the inquiry into the economic realities of the transactions necessary to determine the existence of a security.[18] On remand, the district court should utilize *Bellah's* commercial-investment dichotomy in

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[17]Although the same principles underlie the *Howey* test and other approaches to determining the existence of a security, Judge Friendly has pointed to the difficulty in any attempt to give *Howey* universal application in *Exchange National Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1136 (2d Cir. 1976):

> Frequent reference is made to the test laid down by the Supreme Court in *SEC v. W. J. Howey Co.*, 328 U.S. 293, 301 [66 S.Ct. 1100, 1104, 90 L.Ed. 1244] (1946), in defining what constitutes an "investment contract," namely "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." Although the Court has recently said that this "embodies the essential attributes that run through all of the Court's decisions defining a security," *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852 [95 S.Ct 2051, 2060, 44 L.Ed.2d 621] (1975), the Court has not yet had the note problem before it, and the test seems to us to be of dubious value in that context.

[18]Other courts have refused to grant a motion to dismiss before discovery of facts necessary for the plaintiff to establish jurisdiction. *See, e.g., Surpitski v. Hughes-Keenan Corp.*, 362 F.2d 254 (1st Cir. 1966); *Collins v. New York Central System*, 327 F.2d 880 (D.C.Cir. 1963).

analyzing whether this certificate of deposit is a security.[19] It must examine the transactions to determine the "investment character of the scheme." *Bellah*, 495 F.2d at 1115.[20] We note, however, that the lower court's reliance on *Bellah* for the proposition that these transactions merely reflected currency deposited in a bank is misguided. This is not an ordinary banking transaction in which "currency" was deposited. Rather, a state chartered bank was allowing the sale of "term deposits" in a foreign bank to be sold on its premises by one of its officers.

The district court's order of dismissal for lack of subject matter jurisdiction must be reversed because

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[19]We note, however, that several courts have decided that a certificate of deposit may be a security under the federal securities law without applying this dichotomy. *See Weaver v. Marine Bank*, 637 F.2d 157, 164 (3d Cir. 1980) (explaining that certificates of deposit are the functional equivalents of the withdrawable capital shares in a savings and loan association ruled to be securities in *Tcherepnin*); *MacKethan v. Peat, Marwick, Mitchell & Co.*, 439 F.Supp. 1090, 1094 (E.D.Va.1977) (recognizing that for purposes of a motion to dismiss that the *Forman* test had been met); *Garner v. Pearson*, 374 F.Supp. 591, 596 (M.D.Fla.1974) (finding that time deposits were securities).

[20]Although the lower court cited *Bellah* as support for its decision, it did not utilize *Bellah's* commercial-investment dichotomy for analyzing whether a certificate of deposit is a security. Additionally, the two district court cases relied on by the lower court, *Hamblett v. Board of Savings and Loan Associations*, 472 F.Supp. 158 (N.D.Miss.1979); *Hendrickson v. Buchbinder*, 465 F.Supp. 1250 (S.D.Fla.1979) provide little support for a ruling that no security was involved because they incorrectly apply the investment contract test without analyzing the commercial versus the investment character of the transactions.

plaintiffs' claims that their transactions involved a "security" are not immaterial or insubstantial. *See Bell v. Hood.* As did the court in *Bellah* we remand so that appellants may attempt to demonstrate the investment character of their certificates of deposit.

REVERSED and REMANDED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT B

NO. 79-3106

ANA E. LAING MEASON,
Plaintiff-Appellant,

versus.

POPULAR BANK AND TRUST COMPANY, LTD.,
A Grand Cayman Island Bank, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(July 21, 1981)

Before VANCE, HATCHETT and ANDERSON, Circuit Judges. VANCE, Circuit Judge:

In this action the plaintiff charges violations of the registration and antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 in the sale of a certificate of deposit issued by an offshore bank of the Grand Cayman Islands, British West Indies.

The district court granted defendants' motion to dismiss for lack of subject matter jurisdiction because "a Certificate of Deposit is not a security within the

meaning" of the federal securities laws.[1] Plaintiff moved for reconsideration of the dismissal order and filed an amended complaint. Defendants moved to strike plaintiff's motion and amendment on the grounds that leave of court had not been obtained for the amendment and that the motion for reconsideration had been filed more than ten days after entry of the dismissal order. The court granted defendants' motions, denied reconsideration or leave to amend, and this appeal followed.

Plaintiff contends that the lower court erred in striking plaintiff's amended complaint, filed without leave of court after the dismissal, because no responsive pleading had been filed. Defendants argue that plaintiff failed to comply with Rule 59(e), Federal Rules of Civil Procedure by not filing a motion for reconsideration or leave to amend within 10 days after the dismissal order and that plaintiff did not meet one of the exceptions of Rule 60(b). We agree with plaintiff. Rules 59(e) and 60(b) are not applicable to this situation. Rule 15(a) provides a right to amend a complaint once without leave of court before a responsive pleading is served. In *Massachusetts Mutual Life Insurance Co. v. Ambassador Concessions, Inc.*, 489 F.2d 282 (5th Cir. 1973), this court ruled that amendment as of right should be allowed after dismissal. The contrary action of the trial court was erroneous.

REVERSED AND REMANDED.

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[1]See *Meason v. Bank of Miami*, ___ F.2d ___ [No. 79-3607] (5th Cir. 1981), in which dismissal of a companion case was reversed on the ground that in certain situations a certificate of deposit may be a security.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3106

D. C. Docket No. 79-1476-CIV-JAG

ANA E. LAING MEASON,
Plaintiff-Appellant,

versus

POPULAR BANK AND TRUST COMPANY, LTD.,
A Grand Cayman Island Bank, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

Before VANCE, HATCHETT AND ANDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed in this cause be and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay the costs on appeal to be taxed by the Clerk of this Court.

[FILED SEP 28 1981]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT B

No. 79-3607

ANA LIANG MEASON,
Plaintiff-Appellant,

versus

BANK OF MIAMI, A State Bank and
Florida Corp., ET AL.,
Defendants-Appellees.

EDITH DAVIS,
Plaintiff-Appellant,

versus

BANK OF MIAMI, ET AL.,
Defendants-Appellees.

ERROL S. SCHUTTE and GLORIA SCHUTTE,

versus

BANK OF MIAMI, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

(Opinion August 6, 5 Cir., 1981, ____ F.2d ____).

(September 28, 1981)

Before VANCE, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en

banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

[FILED SEP 9 1981]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT B

No. 79-3106

ANA E. LAING MEASON,
Plaintiff-Appellant,

versus

POPULAR BANK AND TRUST COMPANY, LTD.,
A Grand Cayman Island Bank, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 21, 5 Cir., 1981, ____ F.2d ____).

(SEP 9 1981)

Before VANCE, HATCHETT AND ANDERSON,
Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative

Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

[FILED SEP 27 1979]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ERROL S. SCHUTTE AND GLORIA SCHUTTE,
Plaintiffs,

Vs.

BANK OF MIAMI, et al.,
Defendants.

79-224-CIV-NCR

EDITH DAVIS,
Plaintiff,

V.

BANK OF MIAMI, et al.,
Defendants.

79-299-CIV-NCR

ANA LAING MEASON,
Plaintiff,

Vs.

BANK OF MIAMI, et al.,
Defendants.

79-1474-CIV-NCR

ORDER

These causes are before the court on motions by defendants to dismiss the complaints in Cases 79-299-CIV-NCR 79-1474-CIV-NCR, and to dismiss the amended complaint in 79-224-CIV-NCR. The issues have been fully briefed, and oral argument has been heard on the matter.

In this court's opinion, the dispositive issue in this case is clearly whether the "certificates of deposit" involved in the various transactions are securities within the federal securities laws. All plaintiffs who have attempted to allege diversity of citizenship have not done so properly. It is clear from their amended complaint that plaintiffs Errol S. Schutte and Gloria Schutte are citizens of the Netherland Antilles. It is also clear that defendant Andres F. Rodriguez is an alien, and that defendant Popular Bank & Trust Company, Ltd. is a corporation organized under the laws of the Grand Cayman Islands, British West Indies. Consequently, Case 79-224-CIV-NCR involves a suit between aliens, and thus cannot be considered by this court under diversity of jurisdiction. 13 *Wright and Miller* Federal Practice and Procedure §3604. In Case 79-299-CIV-NCR, plaintiff Edith Davis has failed to allege her citizenship. It is not possible for one who is not a citizen of the United States to be a citizen of a state for diversity purposes. 13, *Wright and Miller*, at 3602. If plaintiff Davis is a resident alien then diversity would fail for the same reasons as in the *Schutte* case i.e., there would be a suit between aliens in the federal court.

Because the federal securities laws are the only possible basis of jurisdiction, the resolution of the

"certificate of deposit" issue will also dispose of plaintiffs' pendent state claims. If there is no independent basis of federal jurisdiction, the court, as announced at the hearing, intends to likewise dismiss the pendent claims. *United Mine Workers v. Gibbs*, 383, U.S. 715 (1966).

Plaintiffs have alleged violations of Section 12(1) and 12(2) of the Securities Act of 1933, 15 U.S.C. §77L(1) and (2); Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10(b)5 promulgated thereunder, 17 C.F.R. §240.10(b)5 Plaintiffs have also alleged various Florida Blue Sky violations and common law causes of action.

The court notes at the outset that the proper analysis of this issue requires an examination of the economic realities of the transactions involved. The mere labelling of an instrument as a security or as a type of "investment" does not make it subject to the securities laws. *International Brotherhood of Teamsters v. Daniel*, ____ U.S. ____. 99 S.Ct. 790 (1979); *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 95 S.Ct. 2051 (1975). Viewed in that light, it must appear that an investor a) invests money b) in an enterprise c) with a reasonable expectation of profits d) to be derived solely from the profits of others. *Forman, Supra* citing *S.E.C. v. W. J. Howey Co.*, 328 U.S. 293, 66 S.Ct. 1100 (1946). Profits have been defined to mean either capital appreciation or a participation in the earnings resulting from the use of the investors funds. *Forman, supra* at 852.

Plaintiffs in this case urge the court to consider these certificates of deposit as securities because they have alleged that the certificates were issued in an

investment setting or that they were offered to a class of investors. *McClure v. First National Bank of Lubbock, Texas*, 497 F.2d 490 (5th Cir. 1974). However, the court does not think that the bare allegations of either of those two factors ends the inquiry. The *McClure* court also added that, "Each case must turn on 'the complete context of each transaction.' " *Id.* at 493 n.2 citing *Lino v. City Investing Co.*, 487 F.2d 689, 696 n.15 (3d Cir. 1973).

Considering the economic realities underlying these transactions, the court finds that the certificates do not constitute securities within the Federal Securities Laws. Although these certificates are clearly investments in that plaintiffs deposited currency with defendants in return for the certificates with the expectation of earning a certain rate of interest, they clearly were not procured with a reasonable expectation of profits solely from the efforts of others. *Howey, supra. Compare, Tcherepnin v. Knight*, 389 U.S. 332, 88 S.Ct. 548 (1967). The certificates simply reflect the amount of currency deposited with a banking institution for an agreed upon period of time. In return for the use of that money, the bank agrees to pay to the depositor a specified rate of interest. There is no expectation, in such an arrangement, to share in the profits derived solely from the efforts of others.

On this point, the court continues to find the language and holdings of several cases so persuasive as to be dispositive. See *Bellah v. First National Bank of Hereford, Texas*, 495 F.2d 1109 (5th Cir. 1974); *Hendrickson v. Buchbinder*, 465 F.Supp. 1250 (S.D. Fla. 1979); *Hamblitt v. Board of Savings and Loan Associations Etc.*, 472 F.Supp. 158 (N.D. Miss. 1979). Likewise the court continues

to find the language of *Burrus, Cootes and Burrus v. MacKethan*, 537 F.2d 1262 (4th Cir. 1976) withdrawn as moot at 545 F.2d 1388 (4th Cir. 1976) persuasive.

Accordingly, having found that none of the above-styled cases involve the purchase or sale of securities within the meaning of federal securities laws it is hereby ORDERED AND ADJUDGED that the complaints are hereby dismissed for lack of subject matter jurisdiction.

DONE AND ORDERED this 26 day of September 1979.

United States District Court Judge

CC: Greenberg, Traurig, Askew, Hoffman, Lipoff, Quentel & Wolf (Sondak)
Michael S. Bienstock, Esq.
Fromberg, Fromberg & Roth P.A. (Rice)
Weintraub & Rosen (Rosen)
Bradford William, McKay, Kimbrell Hamann & Jennins, P.A.
Ernest W. Sardinas Esq.
Blackwell, Walker, Gray, Powers, Flick & Hoehl, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ERROL S. SCHUTTE AND GLORIA SCHUTTE
Plaintiff

vs.

BANK OF MIAMI, et al
Defendants

Case No. 79-224-Civ-NCR

EDITH DAVIS
Plaintiff

vs.

BANK OF MIAMI, et al
Defendants

Case No. 79-299-Civ-NCR

ANA LAING MEASON
Plaintiff

vs.

BANK OF MIAMI, et al
Defendants

Case No. 79-1474-Civ-NCR

THIS CAUSE is before the court on motion by plaintiffs, Errol S. Schutte and Gloria Schutte for reconsideration and/or clarification.

Upon consideration of the record, it is hereby

ORDERED AND ADJUDGED that the motion for reconsideration is denied. It is further

ORDERED AND ADJUDGED that the motion for clarification is hereby granted.

This court's previous order of dismissal was with prejudice. No leave to file an amended complaint was granted or contemplated.

DONE AND ORDERED this 19 day of Oct., 1979.

_____

U.S. District Judge

cc- see attached list

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ERROL S. SCHUTTE AND GLORIA SCHUTTE

vs

BANK OF MIAMI, et al

Case No. 79-224-CIV-NCR

EDITH DAVIS

vs

BANK OF MIAMI, et al

Case No. 79-299-CIV-NCR

ANA LAING MEASON

vs

BANK OF MIAMI, et al

Case No. 79-1474-CIV-NCR

ORDER

Sua Sponte, the court hereby enters this order of clarification of its previous order of October 19, 1979.

The Court's language in that order describing the previous dismissal as with prejudice did not reflect any adjudication on the merits of plaintiffs' claims. Instead it reflected the court's opinion that plaintiffs had not and could not, if leave to amend were granted, invoke this court's subject matter jurisdiction.

DONE AND ORDERED this 30 day of Oct., 1979.

U.S. District Court

cc: Ernest W. Sardinas, Esq.
Michael A. Bienstock, Esq.
Robert M. Sondak, Esq.
Michael A. Rosen, Esq.
Warren D. Hamann, Esq.
Arthur Halsey Rice, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-1476-Civ-JAG

ANA E. LAING MEASON,

Plaintiff,

v.

POPULAR BANK AND TRUST COMPANY, LTD., etc., et al.,

Defendants.

ORDER

This cause came before the Court on the Motions to dismiss of defendants Northside Bank and Navarro. Counts 1, 2 and three of the Complaint are brought pursuant to the Securities Act of 1933 and the Securities Exchange Act of 1934. The remaining counts of the Complaint are brought pursuant to the Court's pendent jurisdiction.

The plaintiff alleges that defendants have violated the above Acts in connection with the sale of a Certificate of Deposit. As set forth by this Court in the opinion in *Hendrickson v. Buchbinder,* Case No. 76-619-Civ-JAG (unpublished opinion dated February 28, 1979), a Certificate of Deposit is not a security within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934. Accordingly, there is no jurisdiction pursuant to these Acts. Inasmuch as diversity jurisdiction has not been alleged, this Court is without jurisdiction to consider plaintiff's claims. It is thereupon

ORDERED and ADJUDGED that defendants' Motions to dismiss are granted and this cause shall be and is hereby dismissed.

DONE and ORDERED at Ft. Lauderdale, Florida on this 15th day of June, 1979.

/s/ Jose A Gonzalez Jr.
District Judge

cc: all counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-1476-Civ-JAG

ANA E. LAING MEASON,

Plaintiff,

v.

POPULAR BANK AND TRUST COMPANY LTD., et al.,

Defendants.

ORDER

THIS CAUSE having come before the Court on defendant Navarro's Motion to strike plaintiff's Motion for reconsideration and the amended Complaint and the Court having considered the Motion and being otherwise duly advised,

It is thereupon

ORDERED AND ADJUDGED that defendant Navarro's Motion to strike is granted and plaintiff's Motion for reconsideration and plaintiff's amended Complaint are hereby stricken. Plaintiff's request for oral arguement is denied as moot.

DONE AND ORDERED at Miami, Florida, this 27th of July, 1979

/s/ Jose A Gonzalez Jr.
UNITED STATES DISTRICT JUDGE

Copies furnished counsel

ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-1476-Civ-JAG

ANA E. LAING MEASON,

Plaintiff,

v.

POPULAR BANK AND TRUST COMPANY, LTD., etc., et al.

Defendants.

THIS CAUSE having come before the Court on plaintiff's petition for reconsideration of Order striking plaintiff's amended complaint and motion of reconsideration or in the alternative motion to amend, and the Court having considered the motion and being otherwise duly advised.

It is thereupon

ORDERED AND ADJUDGED that the motion be denied.

DONE AND ORDERED at Miami, Florida, this 23rd of August, 1979.

/s/ Jose A. Gonzalez Jr.
UNITED STATES DISTRICT JUDGE

Copies furnished counsel

STATUTORY APPENDIX

Section 2(1) of the Securities Act of 1933, 15 U.S.C. §77b(1) (1976)

§77b. Definitions

When used in this subchapter, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(10) (1976)

(10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security,

or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.[1]

Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

International Banking Act of 1978, 12 U.S.C. §3102 (West 1979)

§3102. Establishment of Federal branches and agencies by foreign bank — Approval of Comptroller

(a) Except as provided in section 3103 of this title, a foreign bank which engages directly in a banking business outside the United States may, with the approval of the Comptroller, establish one or more Federal branches or agencies in any State in which (1) it is not operating a branch or agency pursuant to State law and (2) the establishment of a branch or agency, as the case may be, by a foreign bank is not prohibited by State law.

Rules and regulations; rights and privileges; duties and liabilities; exceptions

(b) In establishing and operating a Federal branch or agency, a foreign bank shall be subject to such rules, regulations, and orders as the Comptroller considers appropriate to carry out this section, which shall include provisions for service of process and maintenance of branch and agency accounts separate from those of the parent bank. Except as otherwise specifically provided in this chapter or in rules, regulations, or orders adopted by the Comptroller under this section, operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank at the same location and shall be subject to all the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the National Bank Act to a national bank doing business at the same location, except that (1) the requirements of section 481 of this title shall be met with respect to a

Federal branch or agency if it is examined at least once in each calendar year; (2) any limitation or restriction based on the capital stock and surplus of a national bank shall be deemed to refer, as applied to a Federal branch or agency, to the dollar equivalent of the capital stock and surplus of the foreign bank, and if the foreign bank has more than one Federal branch or agency the business transacted by all such branches and agencies shall be aggregated in determining compliance with the limitation; (3) a Federal branch or agency shall not be required to become a member bank, as that term is defined in section 221 of this title; and (4) a Federal agency shall not be required to become an insured bank as that term is defined in section 1813(h) of this title.

Application to establish Federal branch or agency; matters considered

(c) In acting on any application to establish a Federal branch or agency, the Comptroller shall take into account the effects of the proposal on competition in the domestic and foreign commerce of the United States, the financial and managerial resources and future prospects of the applicant foreign bank and the branch or agency, and the convenience and needs of the community to be served.

Receipt of deposits and exercising of fiduciary powers at Federal agency prohibited

(d) Notwithstanding any other provision of this section, a foreign bank shall not receive deposits or exercise fiduciary powers at any Federal agency. A foreign bank may, however, maintain at a Federal agency

for the account of others credit balances incidental to, or arising out of, the exercise of its lawful powers.

Maintenance of Federal branch and Federal agency in same State prohibited

(e) No foreign bank may maintain both a Federal branch and a Federal agency in the same State.

Conversion of foreign bank branch, agency or commercial leading company into Federal branch or agency; approval of Comptroller

(f) Any branch or agency operated by a foreign bank in a State pursuant to State law and any commercial lending company controlled by a foreign bank may be converted into a Federal branch or agency with the approval of the Comptroller. In the event of any conversion pursuant to this subsection, all of the liabilities of such foreign bank previously payable at the State branch or agency, or all of the liabilities of the commercial lending company, shall thereafter be payable by such foreign bank at the branch or agency established under this subsection.

Deposit requirements; asset requirements

(g)(1) Upon the opening of a Federal branch or agency in any State and thereafter, a foreign bank, in addition to any deposit requirements imposed under section 6 of this Act, shall keep on deposit, in accordance with such rules and regulations as the Comptroller may prescribe, with a member bank designated by such foreign bank, dollar deposits or investment securities of the type that may be held by national banks for their

own accounts pursuant to paragraph "Seventh" of section 24 of this title in an amount as hereinafter set forth. Such depository bank shall be located in the State where such branch or agency is located and shall be approved by the Comptroller if it is a national bank and by the Board of Governors of the Federal Reserve System if it is a State Bank.

(2) The aggregate amount of deposited investment securities (calculated on the basis of principal amount or market value, whichever is lower) and dollar deposits for each branch or agency established and operating under this section shall be not less than the greater of (1) that amount of capital (but not surplus) which would be required of a national bank being organized at this location, or (2) 5 per centum of the total liabilities of such branch or agency, including acceptances, but excluding (A) accrued expenses, and (B) amounts due and other liabilities to offices, branches, agencies, and subsidiaries of such foreign bank. The Comptroller may require that the assets deposited pursuant to this subsection shall be maintained in such amounts as he may from time to time deem necessary or desirable, for the maintenance of a sound financial condition, the protection of depositors, and the public interest, but such additional amount shall in no event be greater than would be required to confirm to generally accepted banking practices as manifested by banks in the area in which the branch or agency is located.

(3) The deposit shall be maintained with any such member bank pursuant to a deposit agreement in such form and containing such limitations and conditions as the Comptroller may prescribe. So long as it continues business in the ordinary course such foreign bank shall,

however, be permitted to collect income on the securities and funds so deposited and from time to time examine and exchange such securities.

(4) Subject to such conditions and requirements as may be prescribed by the Comptroller, each foreign bank shall hold in each State in which it has a Federal branch or agency, assets of such types and in such amount as the Comptroller may prescribe by general or specific regulation or ruling as necessary or desirable for the maintenance of a sound financial condition, the protection of depositors, creditors and the public interest. In determining compliance with any such prescribed asset requirements, the Comptroller shall give credit to (A) assets required to be maintained pursuant to paragraphs (1) and (2) of this subsection, (B) reserves required to be maintained pursuant to section 3105(a) of this title, and (C) assets pledged, and surety bonds payable, to the Federal Deposit Insurance Corporation to secure the payment of domestic deposits. The Comptroller may prescribe different asset requirements for branches or agencies in different States, in order to ensure competitive equality of Federal branches and agencies with State branches and agencies and domestic banks in those States.

Establishment of additional branches or agencies; approval of Comptroller

(h) A foreign bank with a Federal branch or agency operating in any State may (1) with the prior approval of the Comptroller establish and operate additional branches or agencies in the State in which such branch or agency is located on the same terms and conditions and subject to the same limitations and restrictions as

are applicable to the establishment of branches by a national bank if the principal office of such national bank were located at the same place as the initial branch or agency in such State of such foreign bank and (2) change the designation of its initial branch or agency to any other branch or agency subject to the same limitations and restrictions as are applicable to a change in the designation of the principal office of a national bank if such principal office were located at the same place as such initial branch or agency.

Termination of authority to operate Federal branch or agency

(i) Authority to operate a Federal branch or agency shall terminate when the parent foreign bank voluntarily relinquishes it or when such parent foreign bank is dissolved or its authority or existence is otherwise terminated or canceled in the country of its organization. If (1) at any time the Comptroller is of the opinion or has reasonable cause to believe that such foreign bank has violated or failed to comply with any of the provisions of this section or any of the rules, regulations, or orders of the Comptroller made pursuant to this section, or (2) a conservator is appointed for such foreign bank or a similar proceeding is initiated in the foreign bank's country of organization, the Comptroller shall have the power, after opportunity for hearing, to revoke the foreign bank's authority to operate a Federal branch or agency. The Comptroller may, in his discretion, deny such opportunity for hearing if he determines such denial to be in the public interest. The Comptroller may restore any such authority upon due proof of compliance with the provisions of this section and the

rules, regulations, or orders of the Comptroller made pursuant to this section.

Receivership over assets of foreign bank in United States

(j)(1) Whenever the Comptroller revokes a foreign bank's authority to operate a Federal branch or agency or whenever any creditor of any such foreign bank shall have obtained a judgment against it arising out of a transaction with a Federal branch or agency in any court of record of the United States or any State of the United States and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied that such foreign bank is insolvent, he may, after due consideration of its affairs, in any such case, appoint a receiver who shall take possession of all the property and assets of such foreign bank in the United States and exercise the same rights, privileges, powers, and authority with respect thereto as are now exercised by receivers of national banks appointed by the Comptroller.

(2) In any receivership proceeding ordered pursuant to this subsection (j), whenever there has been paid to each and every depositor and creditor of such foreign bank whose claim or claims shall have been proved or allowed, the full amount of such claims arising out of transactions had by them with any branch or agency of such foreign bank located in any State of the United States, except (A) claims that would not represent an enforceable legal obligation against such branch or agency if such branch or agency were a separate legal entity,

and (B) amounts due and other liabilities to other offices or branches or agencies of, and wholly owned (except for a nominal number of directors' shares) subsidiaries of, such foreign bank, and all expenses of the receivership, the Comptroller or the Federal Deposit Insurance Corporation, where that Corporation has been appointed receiver of the foreign bank, shall turn over the remainder, if any, of the assets and proceeds of such foreign bank to the head office of such foreign bank, or to the duly appointed domiciliary liquidator or receiver of such foreign bank.

Pub.L. 95-369, §4, Sept. 17, 1978, 92 Stat. 610.

CAYMAN ISLANDS

Supplement No. 1 published with Gazette No. 2 of 1978.

THE BANKS AND TRUST COMPANIES REGULATION LAW (Revised)

ARRANGEMENTS OF SECTIONS

1. Short title
2. Interpretation
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6. Use of the word "bank" etc.
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9. Powers of the Governor in Council
10. Preservation of secrecy
11. Governor in Council may suspend licence
12. Power of search
13. Regulations
14. Savings
15. Appeals Schedule.

THE BANKS AND TRUST COMPANIES REGULATION LAW (Revised)

Originally enacted Law 8 of 1966 28th May 1966
" 2 of 1971 8th January 1971
" 19 of 1976 1st January, 1977

Published in consolidated and revised form this 16th day of January, 1978, by authority of the Law Revision Law (No. 19 of 1975).

Short title.

1. This Law may be cited as the Banks and Trust Companies Regulation Law (Revised).

Interpretation.

2. In this Law unless the context otherwise requires—

"authorised agent" means a person so designated by a bank or trust company under the provisions of section 4;

"bank" means a person carrying on banking business;

"banking business" means the business of receiving on current, savings, deposit or other similar account money which is repayable by cheque or order and may be invested by way of advances to customers or otherwise;

"company" means a company incorporated either under the laws of the Islands or under the laws of any other country or place;

"licence" means a licence granted under section 4 or deemed to be so granted in accordance with that section;

"licensee" means any person holding a licence under the provisions of this Law;

"person" includes any body of persons corporate or unincorporate;

"prescribed" means prescribed by regulations made under this Law;

"trust business" means the business of acting as trustee, executor or administrator;

"trust company" means any company carrying on trust business.

Licence required to carry on banking business or to operate a trust company.

3. (1) No banking business may be transacted from within the Islands whether or not such business is carried on in the Islands except by a person who is in possession of a valid licence granted by the Governor in Council authorizing him to carry on such business.

(2) No trust company may carry on trust business from within the Islands whether or not such business is carried on in the Islands unless it is in possession of a valid licence granted by the Governor in Council authorizing it to carry on such business.

(3) Whoever contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year or both and in the case of a continuing offence to a fine not exceeding two hundred dollars for each day during which the offence continues.

Application shall be made to the Governor.

4. (1) Any person desirous of carrying on banking business and any company desirous of carrying on trust business from within the Islands shall make application to the Governor for the grant of a licence. Every such application shall be in writing and shall contain such information and particulars and shall be accompanied by such references as may be prescribed and the Governor in Council may, if satisfied that the carrying on of such business will not be against the public interest, grant a licence to such person or company subject to such

terms and conditions, if any, as the Governor in Council may deem necessary.

(2) A licence shall not be granted to any bank or trust company having its head office or its registered office outside the Islands unless such bank or trust company designates and notifies to the Governor—

(a) a principal office in the Islands;

(b) by name one of its officers who is to be the bank's or trust company's authorized agent in the Islands; and

(c) by name another of its officers who in the absence or inability to act of the officer named under paragraph (b) is to be the bank's or trust company's authorized agent in the Islands.

(3) It shall be a condition of every licence granted to a bank or trust company to which subsection 2 applies, that the bank or trust company shall forthwith notify the Governor in writing of any change of—

(a) its principal office in the Islands; or

(b) either or both of the officers designated pursuant to paragraph (b) or (c) of subsection (2).

(4) The Governor in Council may by Order revoke any licence—

(a) if the licensee has ceased to carry on banking business or trust business; or

(b) if the licensee becomes bankrupt or goes into liquidation or is wound up or otherwise dissolved; or

(c) in the circumstances and in the manner provided for in section 9.

(5) Licences granted under subsection (1) shall be granted specifically for carrying on banking business, trust business or both banking and trust business combined and shall be known respectively as banking licences, trust licences and combined banking and trust licences.

(6) Licences granted under subsection (1) shall be granted either specifically for carrying on business under such licence within the jurisdiction of the Islands and known as "A" licences or specifically for carrying on business under such licence outside the jurisdiction of the Islands and known as "B" licences.

(7) Every holder of a current licence shall on or before every 15th day of January during the currency of the licence pay to the Financial Secretary an annual fee of—

(a) $15,000 in respect of an "A" licence whether for carrying on banking, trust or combined banking and trust business; and

(b) $5,000 in respect of a "B" licence whether for carrying on banking, trust, or combined banking and trust business,

and the Financial Secretary shall account to the Treasury for such fees.

(8) Every person to whom a licence is first granted shall at the date of such grant pay to the Financial Secretary in addition to the annual licence fee required to be paid on or before the ensuing 15th day of January under subsection (7) a fee of –

(a) $15,000 in respect of an "A" licence, and

(b) $5,000 in respect of a "B" licence.

(9) Whenever it is considered to be in the public interest, the Governor in Council may refuse to grant a licence.

Shares etc. not to be issued or transferred without approval of Governor in Council.

5. No shares in a company or certificates of deposit or any other securities of such company which is a licensee under this Law shall be issued and no issued shares shall be transferred or disposed of in any manner without the prior approval of the Governor in Council:

The Schedule.

Provided that –

(a) this section does not apply to the several banks and trust companies specified in the Schedule hereto; and

(b) the Governor in Council may exempt any other licensee from the provisions of this section subject to such terms and conditions, if any, as the Governor in Council may deem necessary.

Use of the word 'bank' etc.

6. (1) Except with the approval of the Governor in Council, no person, other than a licensee shall —

(a) use or continue to use the words "bank", "trust", "trust company", "trust corporation", "savings" or "savings and loan" or any of their derivatives either in English or in any other language, in the description or title under which such person is carrying on business from within the Islands whether or not such business is carried on in the Islands;

(b) make or continue to make any representation in any billhead, letter, letterhead, circular, paper, notice, advertisement or in any manner whatsoever that such person is carrying on banking business or trust business;

(c) in any manner whatsoever solicit or receive deposits from the public.

(2) Except with the approval of the Governor in Council, no company shall be registered, or continue to be registered, by a name which contains the words "bank", "trust", "trust company", "trust corporation", "savings", or "savings and loan" or any of their derivatives either in English or in any other language, in the description or title under which such company is carrying

on business from within the Islands whether or not such business is carried on in the Islands.

(3) Before giving his approval under subsection (1) or subsection (2) the Governor in Council may require of any person such references and such information and particulars as may be prescribed.

(4) Whenever he considers it to be in the public interest the Governor in Council may withdraw any approval given under subsection (1).

(5) The Governor in Council may refuse to grant a licence to a bank or trust company, or, if such bank or trust company is already in possession of a licence, he may revoke such licence if, in his opinion, such bank or trust company is carrying on or intending to carry on banking or trust business, as the case may be, under a name which —

(a) is identical with that of any company, firm or business house whether within the Islands or not or which so nearly resembles that name as to be calculated to deceive; or

(b) is calculated to suggest, falsely, the patronage of or connection with some person or authority whether within the Islands or not; or

(c) is calculated to suggest, falsely, that such bank or trust company has a special status in relation to or derived from the Government of the Cayman Islands or has the official backing of or acts on behalf of the said Government or of any department or official thereof or is

recognized in the Islands as a national or central bank or trust company.

(6) Whoever contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding two thousand dollars or to a term of imprisonment not exceeding one year or both and in the case of a continuing offence to a fine not exceeding two hundred dollars for each day during which the offence continues.

Governor in Council may require financial statement, etc., of licensee.

7. The Governor in Council, in relation to a licensee which is or appears likely to become unable to meet its obligations or which in the opinion of the Governor in Council is carrying on business in a manner detrimental to the public interest or to the interest of creditors or depositors of such licensee, may by instrument in writing require the manager or authorized agent of such licensee to supply within such reasonable time as may be specified in the instrument—

(a) the financial statement of that licensee as at a date within the previous fifteen months audited by an auditor who shall be a chartered accountant or a certified public accountant approved of by the Governor; and

(b) such other information relating to the licensee as may be so specified;

and whoever contravenes the requirements of such an instrument or who in response to such an instrument

knowingly or wilfully supplies false information to the Governor is guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars or to a term of imprisonment not exceeding six months or both.

Powers and duties of the Inspector.

8. (1) The Inspector of Banks and Trust Companies (hereinafter referred to as "the Inspector") is a Government Officer appointed by the Governor in Council.

(2) It is the duty of the Inspector—

(a) to maintain a general review of banking practice in the Islands;

(b) whenever he thinks fit or when so required by the Governor in Council to examine in such manner as he thinks necessary the affairs or business of every licensee carrying on business from within the Islands for the purpose of satisfying himself that the provisions of this Law are being complied with and that the licensee is in a sound financial position, and to report to the Governor in Council the results of every such examination;

(c) to examine and report on the several returns delivered to the Governor pursuant to section 7; and

(d) to examine and make recommendations to the Governor in Council with respect to applications for licences.

(3) In the performance of his functions under this Law and subject to the provisions of section 10 the Inspector is entitled at all reasonable times—

(a) to have access to such books, records, vouchers, documents, cash and securities of any licensee;

(b) to call upon the manager or any officer designated by the manager of any licensee for such information or explanation,

as the Inspector may reasonably require for the purpose of enabling him to perform his functions under this Law:

Provided always that the Inspector shall only have access to the account of a depositor of a licensee or to any information, matter or thing relating to or concerning the affairs of any customer of a licensee under the authority of an order of a Judge of the Grand Court made on the ground that there are no means of obtaining the information required by him.

(4) The Inspector with the approval of the Governor in Council may in writing authorize any other person to assist the Inspector in the performance of his functions under this Law.

(5) Whoever fails to comply with any requirement made pursuant to subsection (3) by the Inspector or any person authorized under subsection (4) is guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars or to a term of imprisonment not exceeding six months or both.

Powers of the Governor in Council.

9. If in the opinion of the Governor in Council a licensee is carrying on its business in a manner detrimental to the public interest or to the interests of its depositors or other creditors or is either in the Islands or elsewhere contravening the provisions of this or any other Law or any Order or Regulations made under this Law, the Governor in Council may from time to time, as may to him seem necessary require that licensee forthwith to take such steps as he may consider necessary to rectify the matter or may make an order revoking the licence of such licensee and requiring its business in the Islands to be wound up.

Preservation of secrecy.

10. (1) Except for the purpose of the performance of his duties or the exercise of his functions under this Law or when lawfully required to do so by any court of competent jurisdiction within the Islands or under the provisions of any Law of the Islands, no person shall disclose any information relating to any application by any person under the provisions of this Law or to the affairs of a licensee or of any customer of a licensee which he has acquired in the performance of his duties or the exercise of his functions under this Law.

(2) Whoever contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine not exceeding two thousand dollars or to a term of imprisonment not exceeding one year or both.

Governor in Council may suspend licence.

11. (1) Whenever the Governor in Council is of the opinion that any action under section 4 (4), section 6 or section 9 should be taken against a licensee, he may forthwith suspend the licence of such licensee and before taking such action the Governor in Council shall give that licensee notice in writing of his intention so to do setting out in such notice the grounds on which he proposes to act and shall afford the licensee within such time as may be specified therein not being less than seven days an opportunity of submitting to him a written statement of objections to such action, and thereafter the Governor in Council shall advise the licensee of the decision.

(2) Whenever the Governor in Council suspends a licence under subsection (1) he may cause notice of such suspension to be Gazetted.

12. (1) If a Justice of the Peace is satisfied by information on oath given by the Inspector or by a person authorized under section 8 (4) to assist the Inspector either —

(a) that a licence has been suspended; or

(b) that there is reasonable ground for suspecting that an offence against this Law has been or is being committed and that evidence of the commission of the offence is to be found at any premises specified in the information, or in any vehicle, vessel or aircraft so specified; or

(c) that any books, records, vouchers, documents, cash or securities which ought to have been produced under section 8 (3) and have not been produced are to be found at any such premises or in any such vehicle, vessel or aircraft

he may grant a search warrant authorizing the Inspector or such person authorized under section 8 (4) or any peace officer, together with any other person named in the warrant and any other peace officers, to enter the premises specified in the information or, as the case may be, any premises upon which the vehicle, vessel or aircraft so specified may be, at any time within one month from the date of the warrant, and to search the premises or, as the case may be, the vehicle, vessel or aircraft.

(2) The person authorized by such warrant as aforesaid to search any premises or any vehicle, vessel or aircraft may search every person who is found in or whom he has reasonable ground to believe to have recently left or to be about to enter those premises or that vehicle, vessel or aircraft, as the case may be and may seize any books, records, vouchers, documents, cash or securities found in the premises or in the vehicle, vessel or aircraft which he has reasonable ground for believing ought to have been produced under section 8(3):

Provided that no female shall, in pursuance of any warrant issued under this subsection be searched except by a female.

(3) Where by the virtue of this section a person has any power to enter any premises he may use such force as is reasonably necessary for the purpose of exercising that power.

(4) Whoever obstructs the Inspector or any person in the exercise of any powers conferred on him by virtue of this section is guilty of an offence and liable on summary conviction to a fine not exceeding two hundred dollars or to imprisonment for a term not exceeding three months or both.

Regulations.

13. The Governor in Council may make regulations for all or any of the following purposes:—

(a) to prescribed the information, particulars and references which may be prescribed under section 4 (1) and section 6 (3);

(b) generally for carrying the purposes or provisions of this Law into effect.

Savings.

14. (1) The provisions of this Law have effect in addition to and not in derogation of any other provisions having the force of Law in the Islands.

(2) This Law does not apply to the Government Savings Bank.

Appeals.

15. (1) An appeal lies to the Grand Court from any decision of the Governor in Council —

(a) revoking a licence under section 4 (4), section 6 (5) or section 9;

(b) withdrawing any approval under section 6 (4); or

(c) requiring a licensee to take certain steps which the Governor in Council may specify under section 9.

(2) An appeal against the decision of the Governor in Council shall be on motion. The appellant within twenty-one days after the day on which the Governor in Council has given his decision shall serve a notice in writing signed by the appellant or his counsel or attorney on the Governor of his intention to appeal and of the general ground of his appeal:

Provided that any person aggrieved by a decision of the Governor in Council may upon notice to the Governor apply to the Grand Court for leave to extend the time within which the notice of appeal prescribed by this section may be served, and the Grand Court upon the hearing of such application may extend the time prescribed by this section as it deems fit.

(3) The Governor shall upon receiving the notice of appeal transmit to the Clerk of the Court without delay a copy of the decision and all papers relating to the appeal:

Provided that the Governor in Council is not compelled to disclose any information if it is considered that the public interest would suffer by such disclosure.

(4) The Clerk of the Court shall set the appeal down for argument on such day, and shall cause notice of the same to be published in such manner, as the Grand Court may direct.

(5) At the hearing of the appeal the appellant shall, before going into the case, state all the grounds of appeal on which he intends to rely and shall not, unless by leave of the Grand Court, go into any matters not raised by such statement.

(6) The Grand Court may adjourn the hearing of an appeal and may, upon hearing thereof confirm, reverse, vary or modify the decision of the Governor in Council or remit the matter with the opinion of the Grand Court thereon to the Governor.

(7) An appeal against a decision of the Governor in Council shall not have the effect of suspending the execution of such decision.

SCHEDULE
(Section 5)

The Royal Bank of Canada
Canadian Imperial Bank of Commerce
The Bank of Nova Scotia
Bank of London and Montreal Limited
Barclays Bank International Limited
Citibank N.A.
The Chase Manhattan Bank
E.D. Sassoon Banking Company Limited
Butlers Bank Limited
The Bank of Nassau Limited
World Banking Corporation Limited
Trust Corporation of Bahamas Limited
Arawak Trust Company Limited
First National Trust Company (Bahamas) Limited
The Bank of Nova Scotia Trust Company (Bahamas) Limited
The Chase Manhattan Trust Corporation Limited
Bahamas International Trust Company Limited

Publication in revised form authorized by the Governor in Council this 3rd day of January, 1978.

JENNY MANDERSON
Clerk of the Executive Council.

EXHIBIT "1"

Popular Bank & Trust Company Ltd.
CARDINAL AVENUE, GEORGE TOWN
GRAND CAYMAN, B.W.I. Oct

10/8/76
DATE

1129	TERM DEPOSIT ACCOUNT IN U.S. DOLLARS	MATURITY DATE MO. 10	DAY 6	YEAR 77

NAME AND ADDRESS OF DEPOSITOR(S)

CREDIT

Angela Bernal or Edgardo Bernal or
Mario Bernal ITF Anthony Laing Meason
and Ana Elizabeth Laing Meason de Fresco

Hold Mail to Mr. Mora

CODING 23 — 31 — INTEREST AT MATURITY $8,141.71

THIS DEPOSIT IS MADE ON THE TERMS AND CONDITIONS BELOW

TERM	AMOUNT OF DEPOSIT	INTEREST RATE	MATURITY		
360	$ 125,000.00	6 1/2%	10	10	77

PAYMENT OF INTEREST

☒ CREDIT ACCOUNT NO. 027-26-7 ☒ ADD TO DEPOSIT

☐ REMIT AS FOLLOWS

PAYMENT OF DEPOSIT

☐ DEPOSIT TO BE PAID AT END OF TERM ☐ CREDIT ACCOUNT NO.

☐ REMIT AS FOLLOWS

☐ DEPOSIT TO REMAIN FOR SUCCESSIVE ADDITIONAL TERMS OF SAME LENGTH AT THE PREVAILING INTEREST RATE

THE DEPOSIT IS NOT TRANSFERABLE OR ASSIGNABLE.
THIS TERM DEPOSIT SHALL BE GOVERNED BY THE LAW OF THE JURISDICTION IN WHICH THE ISSUING BANK IS LOCATED.
INTEREST ON THIS DEPOSIT SHALL BE PAID AT MATURITY.
NO INTEREST ON THE DEPOSIT WILL BE PAID IN RESPECT OF ANY PERIOD BEYOND THE END OF THE TERM.
INSTRUCTIONS REGARDING PAYMENT OF THIS DEPOSIT MAY BE MODIFIED BY THE DEPOSITOR UNDER ADVICE TO THE ISSUING BANK TO BE RECEIVED NOT LATER THAN TWO BUSINESS DAYS BEFORE MATURITY.
THE ORIGINAL OF THIS CERTIFICATE MUST BE PRESENT TO ISSUING BANK FOR PAYMENT.

OTHER TERMS AND CONDITIONS

AUTHORIZED SIGNATURE

ORIGINAL

THE ORIGINAL OF THIS CERTIFICATE IS IN OUR VAULT FOR YOUR DISPOSITION
THE BANK OF MIAMI

Best Copy Available

EXHIBIT "2"

Popular Bank & Trust Company Ltd.
CARDINAL AVENUE, GEORGE TOWN,
GRAND CAYMAN, B.W.I. Oct.

10/8/76
DATE

1130	TERM DEPOSIT ACCOUNT IN U.S. DOLLARS	MATURITY DATE MO. 10 DAY 6 YEAR 76

NAME AND ADDRESS OF DEPOSITOR(S)

CREDIT

Angela Bernal or Edgardo Bernal or
Mario Bernal III Anthony Laing Meason
and Ana Elizabeth Laing Meason de Fresco

Hold Mail to Mr. Mora

CODING 03 - 3 - ——— INTEREST AT MATURITY $0.276.00

THIS DEPOSIT IS MADE ON THE TERMS AND CONDITIONS BELOW.

TERM	AMOUNT OF DEPOSIT	INTEREST RATE	MATURES		
360	$ 144,700.00	6 1/2%	10	11	76

PAYMENT OF INTEREST

[X] CREDIT ACCOUNT NO. 022-426-1 [ ] ADD TO DEPOSIT

[ ] REMIT AS FOLLOWS

PAYMENT OF DEPOSIT

[ ] DEPOSIT TO BE PAID AT END OF TERM [ ] CREDIT ACCOUNT NO.

[ ] REMIT AS FOLLOWS

[ ] DEPOSIT TO REMAIN FOR SUCCESSIVE ADDITIONAL TERMS OF SAME LENGTH AT THE PREVAILING INTEREST RATE

THE DEPOSIT IS NOT TRANSFERABLE OR ASSIGNABLE.
THIS TERM DEPOSIT SHALL BE GOVERNED BY THE LAW OF THE JURISDICTION IN WHICH THE ISSUING BANK IS LOCATED.
INTEREST ON THIS DEPOSIT SHALL BE PAID AT MATURITY.
NO INTEREST ON THE DEPOSIT WILL BE PAID IN RESPECT OF ANY PERIOD BEYOND THE END OF THE TERM.
INSTRUCTIONS REGARDING PAYMENT OF THIS DEPOSIT MAY BE MODIFIED BY THE DEPOSITOR UNDER ADVICE TO THE ISSUING BANK TO BE RECEIVED NO LATER THAN TWO BUSINESS DAYS BEFORE MATURITY.
THE ORIGINAL OF THE CERTIFICATE MUST BE PRESENT TO ISSUING BANK FOR PAYMENT.

OTHER TERMS AND CONDITIONS

AUTHORIZED SIGNATURE

ORIGINAL

H2

Best Copy Available

EXHIBIT #1

Popular Bank & Trust Company Ltd.
CARDINAL AVENUE, GEORGE TOWN
GRAND CAYMAN, B.W. I

Sept. 13, 1977
DATE

1230 | TERM DEPOSIT ACCOUNT IN U.S. DOLLARS | MATURITY DATE Mo. 9 | Day 14 | Year 78

NAME AND ADDRESS OF DEPOSITOR(S)

CREDIT

Edith Cuevas ITF
Lisa and/or Susan Davis Cuevas

DEBIT

INTEREST AT MATURITY $30,000.00

THIS DEPOSIT IS MADE ON THE TERMS AND CONDITIONS BELOW.

TERM	AMOUNT OF DEPOSIT	INTEREST RATE	MATURITY DATE Mo.	Day	Year
360	$500,000.00	6%	9	14	78

PAYMENT OF INTEREST

- [ ] CREDIT ACCOUNT NO.
- [X] ADD TO DEPOSIT
- [ ] REMIT AS FOLLOWS

PAYMENT OF DEPOSIT

- [ ] DEPOSIT TO BE PAID AT END OF TERM — CREDIT ACCOUNT NO.
- [ ] REMIT AS FOLLOWS
- [X] DEPOSIT TO REMAIN FOR SUCCESSIVE ADDITIONAL TERMS OF SAME LENGTH AT THE PREVAILING INTEREST RATE

THIS DEPOSIT IS NOT TRANSFERABLE OR ASSIGNABLE.
THIS TERM DEPOSIT SHALL BE GOVERNED BY THE LAW OF THE JURISDICTION IN WHICH THE ISSUING BANK IS LOCATED.
INTEREST ON THIS DEPOSIT SHALL BE PAID AT MATURITY.
NO INTEREST ON THE DEPOSIT WILL BE PAID IN RESPECT OF ANY PERIOD BEYOND THE END OF THE TERM.
INSTRUCTIONS REGARDING PAYMENT OF THIS DEPOSIT MAY BE MODIFIED BY THE DEPOSITOR UNDER ADVICE TO THE ISSUING BANK TO BE RECEIVED NO LATER THAN TWO BUSINESS DAYS BEFORE MATURITY.
THE ORIGINAL OF THE CERTIFICATE MUST BE PRESENT TO ISSUING BANK FOR PAYMENT.

OTHER TERMS AND CONDITIONS

AUTHORIZED SIGNATURE

ORIGINAL

THE BANK OF MIAMI

THE ORIGINAL OF THIS CERTIFICATE IS IN OUR VAULT FOR YOUR DISPOSITION.

ORIGINAL CERTIFICATE OF DEPOSIT HAS BEEN LEFT IN SAFEKEEPING IN OUR VAULT.-

H3

EXHIBIT "3"

Pof .ar Bank & Trust Compc Ltd
CARDINAL AVENUE, GEORGE TOWN
GRAND CAYMAN, B.W. I

12/5/77
DATE

	TERM DEPOSIT ACCOUNT IN U.S. DOLLARS	MATURITY DATE Mo.	Day	Year
		12	5	78

NAME AND ADDRESS OF DEPOSITOR(S)

CREDIT

Angela Bernal or Edgardo Bernal
ITF Anthony Laing Meason and Ana
Elizabeth Laing Meason de Fresco

Hold Mail to Mr. Mora

CODING: [ ] [ ] [ ] INTEREST AT MATURITY [illegible]

THIS DEPOSIT IS MADE ON THE TERMS AND CONDITIONS BELOW.

TERM	AMOUNT OF DEPOSIT	INTEREST RATE			
365 D.	$ 147,000.00	7 7/8%	12	5	77

PAYMENT OF INTEREST

☐ CREDIT ACCOUNT NO 420-2064-5 ☐ ADD TO DEPOSIT
with the First Bank of Miami
☐ REMIT AS FOLLOWS

PAYMENT OF DEPOSIT

☐ DEPOSIT TO BE PAID AT END OF TERM ☐ CREDIT ACCOUNT NO.
☐ REMIT AS FOLLOWS
☐ DEPOSIT TO REMAIN FOR SUCCESSIVE ADDITIONAL TERMS OF SAME LENGTH AT THE PREVAILING INTEREST RATE

THE DEPOSIT IS NOT TRANSFERABLE OR ASSIGNABLE.
THIS TERM DEPOSIT SHALL BE GOVERNED BY THE LAW OF THE JURISDICTION IN WHICH THE ISSUING BANK IS LOCATED.
INTEREST ON THIS DEPOSIT SHALL BE PAID AT MATURITY.
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THE ORIGINAL OF THE CERTIFICATE MUST BE PRESENT TO ISSUING BANK FOR PAYMENT.

OTHER TERMS AND CONDITIONS

EXHIBIT "4"

Popular Bank & Trust Compa. Ltd.
CARDINAL AVENUE, GEORGE TOWN
GRAND CAYMAN, B.W.I

12-F-77
DATE

1230	TERM DEPOSIT ACCOUNT IN U.S. DOLLARS	MATURITY DATE Mo.	Day	Year
		12	5	78

NAME AND ADDRESS OF DEPOSITOR(S)

CREDIT

Angela Bernal or Edgardo Bernal
175 Anthony Laing Meeson and Ana
Elizabeth Laing Meeson de Fresco

Hold Mail to Mr. Mora

CODING | | | | INTEREST AT MATURITY

THIS DEPOSIT IS MADE ON THE TERMS AND CONDITIONS BELOW

TERM	AMOUNT OF DEPOSIT	INTEREST RATE	MATURES Mo.	Day	Yr
3 da.	$ 144,700.00	7 7/8%	12	5	77

PAYMENT OF INTEREST

☐ CREDIT ACCOUNT NO. 420-2061-5 ☐ ADD TO DEPOSIT
with the The Bank of Miami
☐ REMIT AS FOLLOWS

PAYMENT OF DEPOSIT

☐ DEPOSIT TO BE PAID AT END OF TERM ☐ CREDIT ACCOUNT NO.
☐ REMIT AS FOLLOWS
☐ DEPOSIT TO REMAIN FOR SUCCESSIVE ADDITIONAL TERMS OF SAME LENGTH AT THE PREVAILING INTEREST RATE

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THE ORIGINAL OF THE CERTIFICATE MUST BE PRESENT TO ISSUING BANK FOR PAYMENT.

OTHER TERMS AND CONDITIONS

AUTHORIZED SIGNATURE

Best Copy Available

EXHIBIT "E"

Popular Bank & Trust Comp[illegible] Ltd.
CARDINAL AVENUE, GEORGE TOWN
GRAND CAYMAN, B.W. I

5/31/78
DATE

1309	TERM DEPOSIT ACCOUNT IN U.S. DOLLARS	MATURITY DATE Mo.	Day	Year
		6	30	78

NAME AND ADDRESS OF DEPOSITOR(S)

CREDIT

[illegible]

Hold Mail

CODING: [ ] [ ] [ ] INTEREST AT MATURITY [ ]

THIS DEPOSIT IS MADE ON THE TERMS AND CONDITIONS BELOW.

TERM	AMOUNT OF DEPOSIT	INTEREST RATE	ISSUE DATE OF DEPOSIT Mo.	Day	Year
30d	$ 50,006	6 3/4	5	31	78

PAYMENT OF INTEREST

- [ ] CREDIT ACCOUNT NO. [ ] ADD TO DEPOSIT
- [X] REMIT AS FOLLOWS [illegible] M E 2066

PAYMENT OF DEPOSIT

- [ ] DEPOSIT TO BE PAID AT END OF TERM [ ] CREDIT ACCOUNT NO.
- [ ] REMIT AS FOLLOWS
- [ ] DEPOSIT TO REMAIN FOR SUCCESSIVE ADDITIONAL TERMS OF SAME LENGTH AT THE PREVAILING INTEREST RATE

THE DEPOSIT IS NOT TRANSFERABLE OR ASSIGNABLE.
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THE ORIGINAL OF THE CERTIFICATE MUST BE PRESENT TO ISSUING BANK FOR PAYMENT.

OTHER TERMS AND CONDITIONS

AUTHORIZED SIGNATURE

[illegible]

EXHIBIT "F"

Popular Bank & Trust Company Ltd.
CARDINAL AVENUE, GEORGE TOWN
GRAND CAYMAN, B.W. I

5/31/78
DATE

1310	TERM DEPOSIT ACCOUNT IN U.S. DOLLARS	MATURITY DATE Mo.	Day	Year
		6	30	78

NAME AND ADDRESS OF DEPOSITOR(S)

CREDIT

[illegible] Schultz or Denis Nat.

[illegible] Hall

CODING: INTEREST AT MATURITY

THIS DEPOSIT IS MADE ON THE TERMS AND CONDITIONS BELOW.

TERM	AMOUNT OF DEPOSIT	INTEREST RATE	VALUE DATE OF DEPOSIT
30d	$250,000.00	7%	5/31/78

PAYMENT OF INTEREST

☐ CREDIT ACCOUNT NO. ☐ ADD TO DEPOSIT

☐ REMIT AS FOLLOWS make check [illegible] E Shultz

PAYMENT OF DEPOSIT

☐ DEPOSIT TO BE PAID AT END OF TERM ☐ CREDIT ACCOUNT NO.

☐ REMIT AS FOLLOWS

☒ DEPOSIT TO REMAIN FOR SUCCESSIVE ADDITIONAL TERMS OF SAME LENGTH AT THE PREVAILING INTEREST RATE

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OTHER TERMS AND CONDITIONS

AUTHORIZED SIGNATURE

[signature]

Popular Bank & Trust Compo Ltd.
CARDINAL AVENUE, GEORGE TOWN
GRAND CAYMAN, B.W. I

3/17/78
DATE

1298	TERM DEPOSIT ACCOUNT IN U.S. DOLLARS	MATURITY DATE Mo.	Day	Year
		3	12	79

NAME AND ADDRESS OF DEPOSITOR(S)

CREDIT

Edgardo Bernal or Angela Bernal
ITF Anthony Laing Heason or
Ana E. Laing Heason

CODING: [ ] [ ] [ ] INTEREST AT MATURITY $15,780.82

THIS DEPOSIT IS MADE ON THE TERMS AND CONDITIONS BELOW.

TERM	AMOUNT OF DEPOSIT	INTEREST RATE			
360 days	$ $200,000.00	8%	3	17	78

PAYMENT OF INTEREST

[X] CREDIT ACCOUNT NO. 83-20001-0 [ ] ADD TO DEPOSIT
[ ] REMIT AS FOLLOWS with Northside Bank of Miami

PAYMENT OF DEPOSIT

[ ] DEPOSIT TO BE PAID AT END OF TERM [ ] CREDIT ACCOUNT NO.
[ ] REMIT AS FOLLOWS
[ ] DEPOSIT TO REMAIN FOR SUCCESSIVE ADDITIONAL TERMS OF SAME LENGTH AT THE PREVAILING INTEREST RATE

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OTHER TERMS AND CONDITIONS

AUTHORIZED SIGNATURE

Opposition

Office - Supreme Court, U.S.
FILED
NOV 19 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-756

in the

Supreme Court

of the

United States

October Term, 1981

BANK OF MIAMI, POPULAR BANCSHARES CORPORATION, POPULAR BANK AND TRUST COMPANY, LTD., FRANCISCO A. NAVARRO, ANDRES F. RODRIGUEZ, HAYDEE RODRIGUEZ

Petitioners,

vs.

ANA LAING MEASON, EDITH DAVIS, ERROL S. SCHUTTE, GLORIA SCHUTTE

Respondents.

AND

BANK OF MIAMI, f/k/a NORTHSIDE BANK, POPULAR BANK AND TRUST COMPANY, LTD., FRANCISCO A. NAVARRO, ANDRES F. RODRIGUEZ, HAYDEE RODRIGUEZ

Petitioners,

vs.

ANA LAING MEASON

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
for the Fifth Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION

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No. 81-756

in the

Supreme Court

of the

United States

October Term, 1981

BANK OF MIAMI, POPULAR BANCSHARES CORPORATION, POPULAR BANK AND TRUST COMPANY, LTD., FRANCISCO A. NAVARRO, ANDRES F. RODRIGUEZ, HAYDEE RODRIGUEZ

Petitioners,

vs.

ANA LAING MEASON, EDITH DAVIS, ERROL S. SCHUTTE, GLORIA SCHUTTE

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AND

BANK OF MIAMI, f/k/a NORTHSIDE BANK, POPULAR BANK AND TRUST COMPANY, LTD., FRANCISCO A. NAVARRO, ANDRES F. RODRIGUEZ, HAYDEE RODRIGUEZ

Petitioners,

vs.

ANA LAING MEASON

Respondent.

INTRODUCTION

This brief in opposition to the petition for writ of certiorari is filed on behalf of the respondents, Ana Laing Meason, Edith Davis, Errol S. Schutte and Gloria Schutte. The respondents will be referred to individually

by name and collectively as plaintiffs. The petitioners will be referred to individually by name and collectively as defendants.

STATEMENT OF THE CASE

The plaintiffs cannot accept the defendants' statement of the case because it is not a fair summary of the facts or the issues presented below. For purposes of determining jurisdiction, this Court should look exclusively to the opinion of the Fifth Circuit for a full and fair description of the proceedings in the district court, the underlying factual allegations, and the nature of the relief granted by the circuit court. The Fifth Circuit decision is reported as *Meason v. Bank of Miami*, 652 F.2d 542 (5th Cir. 1981) and has been reproduced in the defendants' Appendix A.

REASONS FOR DENYING THE WRIT

The petition should be denied for its unpardonable sophistry. The Questions Presented for Review are profound. The opinion subject to review is for jurisdictional purposes quite pedestrian. The Questions Presented were neither asked nor answered by the Fifth Circuit in its opinion. The Fifth Circuit applied well established principles of law to the particular facts of this case.

The defendants ask whether a true certificate of deposit issued by a legitimate banking institution is a security. This question is of substance only in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not

sit to satisfy scholarly interest in such issues, nor does it sit for the benefit of the particular litigants. *Rice v. Sioux City Memorial Park Cemetery Inc.*, 349 U.S. 70, 74 (1955). The reasons for invoking the jurisdiction of this Court "imply a reach to a problem beyond the academic or the episodic." *Id.*

The penultimate paragraph of the Fifth Circuit opinion exposes the fundamental fallacy in the defendants' argument. It also discloses the limited scope of the Fifth Circuit decision.

The fallacy in the defendants' argument is its presumption that this was an ordinary banking transaction. But as the Fifth Circuit recognized:

> This is not an ordinary banking transaction in which "currency" was deposited. Rather, a state chartered bank was allowing the sale of "term deposits" in a foreign bank to be sold on its premises by one of its officers. [652 F.2d at 551; A. 22]

The Fifth Circuit reversed because:

> [B]y dismissing this suit for lack of subject matter jurisdiction, the district court foreclosed the inquiry into the economic realities of the transactions necessary to determine the existence of a security. [652 F.2d at 550-551; A. 21]

The Fifth Circuit decision is not in conflict with the Seventh Circuit holding in *Canadian Imperial Bank*

of Commerce Trust Company v. Fingland, 615 F.2d 465 (7th Cir. 1980), but is in complete harmony with that decision. In *Canadian Imperial Bank*, the Seventh Circuit concluded:

> We have been cautious not to say that *any* document called a certificate of deposit cannot be a security. The definitional provision begins with the words "unless the context otherwise requires" and if a victim can adequately plead non-conclusory allegations showing the context, substance and reality surrounding the sale or purchase of a particular investment, he may well succeed. [615 F.2d at 470; emphasis by the court]

In *Canadian Imperial Bank*, the pleadings were inadequate. Here, they suffice. There is no conflict in the law applied to the distinctive circumstances of each case.

Petitions for writs of certiorari should be denied when the conflict in the Circuit Court decisions turns solely on an evaluation of the facts. This Court has recognized a rule of non-interference where the conclusions of the Circuit Courts of Appeal depend on an appreciation of circumstances which admit of different interpretations. *National Labor Relations Board v. Pittsburgh Steamship Company*, 340 U.S. 498, 503 (1951). Certiorari is to be granted only in cases involving the settlement of issues of importance to the public as distinguished from those of the parties. There must be a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal before this Court should intervene. *Id.* at 502.

This Court has granted certiorari to review *Weaver v. Marine Bank*, 637 F.2d 157 (3d Cir. 1980). That does not, however, necessitate the grant of certiorari here because the Fifth Circuit neither followed nor expressly rejected the *Marine Bank* decision. Although invited to do so, the Fifth Circuit did not reach the question of whether a true certificate of deposit is or should be considered a security. At footnote 19, the Fifth Circuit simply commented that several courts have decided that a certificate of deposit may be a security under the federal securities law without applying the commercial-investment dichotomy, citing *Marine Bank* as an example (652 F.2d at 551; A. 22).

The Fifth Circuit opinion will have no impact whatsoever on legitimate banking activities. Application of the anti-fraud provisions of the federal securities laws to ultra vires banking activities will not undermine the well-established practices long followed in the ethical financial community or impose unwarranted costs on banks or their customers. All of the imaginary horribles argued at pages 17-19 of the petition are just that.

Throughout their petition, the defendants refer to Popular Bank and Trust as "an international banking institution." "Institution" connotes an established business of substance. Popular Bank and Trust is not an institution. It is an illusion. The defendants led the plaintiffs to believe that Popular Bank and Trust was an established international banking institution of substance and a safe investment. This misrepresentation was the cornerstone of the fraud committed upon them. Popular Bank and Trust Company, Ltd., is a Grand Cayman corporation organized to evade federal and state banking laws and regulations. Popular Bank and Trust was not

licensed to do business in the State of Florida or in any other state and was illegally doing business in the United States through the offices and employees of the Bank of Miami (652 F.2d at 544-546; A. 5-10). When Mr. Schutte first went to the Grand Cayman Islands, to get his money back, he was unable to locate any office or establishment known as Popular Bank and Trust. (652 F.2d at 545; A. 7-8).

The securities laws should protect the unsuspecting public when domestic banking institutions and their employees depart from legitimate banking activities and solicit venture capital. The entire thrust of the plaintiffs' complaint is that the certificates labeled "Term Deposit Account in U.S. Dollars" were insecure investments and were not legitimate non-equity, bank issued certificates of deposit. The Fifth Circuit held that the complaint alleged sufficient facts to withstand a motion to dismiss, reversed, and remanded "so that appellants may attempt to demonstrate the investment character of their certificates of deposit." (652 F.2d at 551; A. 23).

The Fifth Circuit applied well settled principles of law. It is beyond debate in securities law that the label applied to the instrument is irrelevant. It is the substance rather than the form of the transaction which is controlling. *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975). The reach of the Securities Act does not stop with the obvious and the commonplace. The definition of security embodies a flexible rather than a static principle capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits. *Tcherepnin v. Knight*, 389 U.S. 332, 338 (1967).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES C. BLECKE
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-and-

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Telephone: (305) 358-1484

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed, postage prepaid, pursuant to Supreme Court Rules 28.3 and 28.4 to FROMBERG, FROMBERG, ROTH, GROSS, COHEN and SHORE, Attn: Todd S. Rogel, Esquire, Suite M-102, Biscayne Building, 19 West Flagler Street, Miami, Florida 33130; GEORGE, HARTZ & McNARY, Attn: Charles H. Hartz, Esquire, Suite 1110, Ingraham Building, 25 S.E. 2nd Avenue, Miami, Florida 33131; WEINTRAUB & ROSEN, Attn: Michael A. Rosen, Esquire, Suite 306, 1401 Brickell Avenue, Miami, Florida 33131; GREENBERG, TRAURIG, ASKEW, HOFFMAN, LIPOFF, QUENTEL & WOLFE, P.A., Attn.: Alan T. Dimond, Esquire, 1401 Brickell Avenue, PH-1, Miami, Florida 33131; VICTOR HUGO RAMS, ESQUIRE, 2742 S.W. 8th Street, Kohly Building, Suite 203, Miami, Florida 33135; BRUCE CULPEPPER, ESQUIRE, 318 North Calhoun Street, Tallahassee, Florida 32301; HONORABLE REX E. LEE, SOLICITOR GENERAL, Department of Justice, Washington, D.C. 20530; ARTHUR L. BEAMON, ESQUIRE, Federal Deposit Insurance Corporation, Washington, D.C. 20429; and DAVID A. SIRIGNANO, ESQUIRE, Securities & Exchange Commission, Washington, D.C. 20549 this 13th day of November, 1981.

JAMES C. BLECKE
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